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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY COMPANY OF AMERICA, PETITIONERS,

vs.

ANTONIA ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED DECEMBER 31, 1935.

CERTIORARI GRANTED FEBRUARY 17, 1936.

SUPREME COURT OF THE UNITED STATES

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IN SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR SNOHOMISH COUNTY

No. 32185

ANTONIA ANELICH, Administratrix of the Estate of Mario Anelich, Plaintiff,

vs.

Purse Sein Fishing Vessel, "Arizona", her Engine, Hull, Tackle, Nets, Seines, Apparel, and Furniture; Antone Mardesich and Jane Doe Mardesich, his wife, Peter Mardesich and Jane Doe Mardesich, his wife, Defendants.

COMPLAINT—Filed Oct. 16, 1933

Plaintiff complains and for cause of action alleges:

I

That heretofore, on or about the 16th day of October, 1933, the plaintiff was by an order duly made and given by the above entitled court, appointed administratrix of the estate of Mario Anelich, deceased; that she has qualified as such administratrix, and is now, and at all times since the date of said order, has been the duly appointed, qualified, and acting administratrix of said estate.

II

That at all the time herein mentioned the defendants, Antone Mardesich and Jane Doe Mardesich were husband and wife, constituting a marital community under the laws of the State of Washington, and were and are residents of Snohomish County, and were and are the owners and operators of the Purse Seine Fishing Vessel "Arizona", engaged in fishing in the navigable waters of Puget Sound, within the State of Washington, and that all the matters, things, ownership, and operation of said vessel were done [fol. 2] and had for the use and benefit of said defendants, and each of them, and for the use and benefit and advantage of the said marital community.

III

That at all the times herein mentioned Peter Mardesich and Jane Doe Mardesich were husband and wife, constituting a marital community under the laws of the State of Washington, and were and are residents of Snohomish County in said State, and that all the acts, matters, and things done and the employment of the said Peter Mardesich as master of the said Purse Seine Fishing Vessel "Arizona", were had and done for the use and benefit of said defendants, and each of them, and for the use and benefit of the marital community of said defendants.

IV

That on or about the 1st day of August, 1933, the Purse Seine Fishing Vessel "Arizona" 51′ 5″ in length, 14′ 1″ in width, 6′ 3″ in depth, 100 H. P. Diesel Engine, 32.5 gross tons, 22 net tons, official register number 212882, was fishing with purse seine in Mitchell Bay in the navigable waters of Puget Sound in the State of Washington.

That at said time Mario Anelich was a member of the crew of said vessel, engaged in and about the performance of his duties as a member of the crew of said vessel, under the command of Peter Mardesich, Master thereof.

That Peter Mardesich, one of the defendants above named, was Master of said vessel and in charge of her navigation and operation.

That Antone Mardesich, one of the defendants above named, was on said vessel at all the times herein mentioned, representing himself and Jane Doe Mardesich, his wife, and the community which exists between them, as owners of said vessel, and had full and complete knowledge and information concerning all the facts hereinafter alleged.

[fol. 3] V

That at about 8:30 in the morning of the 1st day of August, 1933, the said vessels and said defendants were hauling in the purse seine by use of the winch, operated and driven by the engine shaft, clutches, and gear of said vessel, which operation consisted of taking a number of turns of the purse line around the drum or niggerhead of the winch, the slack or loose end of the said purse line being pulled in or taken from the winch by hand, thus keeping it

tight by friction on the drum or niggerhead of said winch, and that Mario Anelich at said time was ordered and directed to pull on and take in the slack or loose end of the purse line then being hauled in by said winch; that the deck and hatch covers of said vessel at said time were covered with water, oil, and fish slime, and were slick and slippery.

VI

That while the said Mario Anelich was engaged in his duty of taking in the said purse line his feet slipped from under him and became tangled in the purse line which was caught in the winch and wound around the drum or niggerhead, pulling the left leg of Mario Anelich into and winding it around the drum or niggerhead of said winch, breaking and crushing the upper third of the tibia and fibula in many places, cutting, tearing, and crushing the flesh and muscles of said leg, and twisting the same around the said drum or niggerhead of said winch, rendering the said Mario Anelich sick, sore and accutely ill, from which he suffered great physical and mental shock, and great physical pain and suffering and loss of blood, and thereafter by reason of said injuries, and by reason of the neglect of the defendants to give him prompt medical care and attention, as hereinafter alleged, he became infected with septicemia (blood poisoning), from which he lingered and thereafter, [fol. 4] on or about the 8th day of August, 1933, he died from said injuries and by reason of said neglect, intestate, leaving surviving him his widow, plaintiff above named, and two minor children of the ages of eleven and twelve years respectively.

VII

That said Purse Seine Fishing Vessel "Arizona", was, at the time of the injuries hereinbefore described, unseaworthy, in that her engine, gear, shafts, clutches, and winches were old, rusted, worn out, broken, defective, and unsafe to such an extent that they could not be operated or used without great danger to life and limb of the crew of said vessel, and particularly the said Mario Anelich, who was at the time taking in the purse line of said vessel, and by reason of the unseaworthy condition of said vessel, her machinery and equipment as hereinbefore alleged, the place w-ere plaintiff's intestate was ordered and directed to work

and the machinery and equipment with which he was ordered and directed to work was unsafe and dangerous.

VIII

That at the time of the injuries to the said Mario Anelich there was no one in the engine room in charge of said engine, all persons on board being at said time on the deck of said vessel, and because of the defective condition of said machinery and equipment, the winch could not be unclutched or stopped by any one on deck in time to prevent the purse line from being wound up on said winch, and the crushing, breaking, and tearing of the leg of said Mario Anelich, and by reason thereof the said wi-ch continued to operate and run and to wind up said purse line, and crush, tear, and injure the leg of plaintiff's intestate, until the owner of said vessel, Antone Mardesich, went from the deck of said vessel to the engine room and shut off the power, during which time and by reason of the delay the left leg of the said Mario Anelich was taken into and wound [fol. 5] around the drum of said winch and crushed, mangled and injured as aforesaid.

IX

That the said Purse Seine Fishing Vessel "Arizona" was at the time of the injuries hereinbefore described, within eight miles of Victoria, British Columbia, which could have been reached by said vessel within approximately one hour, and was within a few hours' run to Bellingham, Washington, at each of which said places there were ample and sufficient hospital facilities and accommodations, with competent and skilled physicians and surgeons and trained nurses, where plaintiff's intestate could have been taken where he could have had and would have received prompt and efficient and skil-ful medical attention to which his ills and injuries would have responded and he would have recovered; that the said Mario Anelich could have been transported by airplane to Seattle, Washington, and could have been delivered to any one of the hospitals in Seattle, Washington, within two hours immediately following his injury had a plane been called or used, at which place there was sufficient and ample hospital accom-odations with skilled physicians and surgeons, who could have and would have applied remedies and treat-

ments that would have saved the life of the said Mario Anelich, had he been delivered to said hospitals and received said treatments before he became infected with septicemia (bloom poisoning); that said defendant knew and appreciated the severeness of said injuries, and knew and appreciated the necessity for medical attention at the earliest moment possible. They also knew that the said Mario Anelich was so badly injured that he was physically and mentally incapacitated to exercise judgment or to direct the operations necessary to secure for himself the needed attention.

[fol. 6] That said defendants also knew, or by the exercise of reasonable care and diligence, could have known that at said time there was available airplane service maintained in the City of Seattle by the Northwest Air Service, Inc., Boeing Field, Seattle, telephone number Glendale 0927; Washington Aircraft & Transport Corporation, Boeing Field, Glendale 0271; Gorst Air Transport, Inc., Pier 3, Seattle, Washington, telephone number Elliott 0998, with planes available, willing, and ready at reasonable cost, to respond to a call, and could have and would have rendered prompt service, and had they, or any of them, been called could have and would have responded, and said Mario Anelich could have been transported to Seattle, where he could have had, and would have had the benefit of the services of hospitals and skilled physicians and curgeons within two hours from the time of his injuries; that said airplane service was advertised to the general public and the telephone numbers hereinbefore enumerated were lis-ed in the telephone directory and was available to defendants at Friday Harbor, and could have been ascertained by inquiry of the San Juan Telephone Company at Friday Harbor, who could have and would have secured for the defendants immediate communication and telephone connections with any one or all of the operators or managers of said plane services.

X

That said defendants, and each of them, failed, neglected, and refused to avail themselves of any of the facilities for getting the said Mario Anelich to a hospital and securing for him prompt and reasonable medical attention, and instead thereof transferred him from the said Purse Seine

Fishing Vessel "Arizona", by use of a small skiff to the Fishing Vessel "Congress" which in turn transferred him to the "Excel II" a fishing vessel tender, which last named [fol. 7] vessel took him to Friday Harbor, arriving there at about 10:30 in the forenoon of said day, where he remained until five o'clock in the afternoon of said day, when he was taken aboard a United States Coast Guard Patrol vessel, which said vessel took him to Seattle, Washington, where he was delivered to the United States Marine Hospital at 10:30 P. M., fourteen hours after he was injured, during which time and by reason of the shifting and handling of the said Mario Anelich from one vessel to another, and by reason of the delay, and by reason of the loss of blood, he suffered great pain, physical and mental anguish, and developed septicemia (blood poisoning), from which he later died.

That said defendants gave no concern, effort, or attention to the said Mario Anelich, but delivered him into the hands of strangers, without any obligation to care for or supply maintenance and cure, and left him to the mercy of said strangers to secure for him the maintenance and cure which the defendants were legally bound to furnish to the said Mario Anelich.

XI

That the said Mario Anelich at the time of his death was forty-four (44) years old, and prior to the injury herein referred to he was a healthy, able-bodied man, capable of earning, and was earning $200.00 per month; was industrious, sober, and a good steady, faithful worker and provided for and was living with and maintaining his wife and his said two minor children, and was an affectionate husband and kind father, and had and maintained a kind and happy marital relation with his wife, plaintiff herein, and but for the negligence of said defendants as hereinbefore alleged, said Mario Anelich would have lived and continued to provide for, live with and keep up the relations to his family as aforesaid for a period of twenty-[fol. 8] five years; that by reason of the negligence of the defendants in the respects herein alleged, plaintiff has been damaged in the sum of Thirty-Five Thousand ($35,000.00) dollars, no part of which has been paid.

XII

That the said Purse Seine Vessel "Arizona" is within the navigable waters of Puget Sound, within the State of Washington and within the jurisdiction of this Honorable Court, and is liable to the plaintiff herein for her damages, and subject to lien therefor.

XIII

That Walter Faulkner, Sheriff of Snohomish County, is a fit and proper person for this Court to appoint as a receiver to take possession of said vessel and hold the same subject to further orders of this Court, and that notice to show cause, and an order therefor, should issue against the said Purse Seine Fishing Vessel "Arizona", and her owners, and all other persons having, or claiming any interest therein, should be required to appear and show cause, if any they have, why the said Sheriff should not be appointed receiver to hold and dispose of said vessel as he may be directed in accordance with the rules and practices of this Honorable Court in such cases.

Wherefore, Plaintiff prays:

1. That this Honorable Court issue its order to show cause, returnable at some convenient date, directing and requiring defendants and said vessel to show cause why receiver should not be appointed to take charge of said Purse Seine Fishing Vessel "Arizona".

[fol. 9] 2. That at the hearing upon said order to show cause Walter Faulkner, Sheriff of Snohomish County, be appointed receiver to take charge of *sad* hold said vessel, pending the final disposition of plaintiff's cause of action.

3. That plaintiff have and recover of and from said defendants and said Purse Seine Fishing Vessel "Arizona" her full damages for the injuries and loss alleged in her complaint in the sum of Thirty-Five Thousand ($35,000.00) dollars, together with interest thereon at the legal rate, with her taxable costs and disbursements herein expended.

4. That said Purse Seine Fishing Vessel "Arizona" her engine, hull, tackle, nets, seines, apparel, and furniture, be condemned and sold to satisfy the claim lien, and judgment

of plaintiff herein, and that plaintiff have such other and further relief as to the Court may seem just and equitable in the premises

Chas. A. Wallace, Attorney for Plaintiff, Office and Post Office Address, 932 Republic Building, Seattle, Washington.

Duly sworn to by Antonia Anelich. Jurat omitted in printing.

[fol. 10] [File endorsement omitted]

IN SUPERIOR COURT OF SNOHOMISH COUNTY

[Title omitted]

ANSWER—Filed March 15, 1934

Comes now the defendants, and for answer to plaintiff's complaint herein, deny and allege as follows, to-wit:

I

Answering Paragraph I of Plaintiff's Complaint, defendants admit that Antonia Anelich is the appointed Administratrix of the Estate of Mario Anelich, deceased, and except as herein admitted deny each and every allegation contained in said plaintiff's complaint.

II

Answering Paragraph 2 of plaintiff's complaint, defendant's admit that Antone Mardesich and his wife constitute a marital community under the laws of the State of Washington, and that they were and are residents of Snohomish County, and except as herein above admitted deny each and every other allegation contained in Paragraph 2 of said plaintiff's complaint.

III

Answering Paragraph 3 of plaintiff's complaint, the defendants admit that Peter Mardesich and his wife constitute a marital community under the laws of the State of Wash-
[fol. 11] ington, and except as herein above admitted deny each and every other allegation contained in paragraph 3 of plaintiff's complaint.

IV

Answering Paragraph 4 of Plaintiff's complaint, defendants admit that on the first day of August, 1933, Fishing Vessel "Arizona" was fishing with purse seines in the navigable waters of Puget Sound; that on that day Mario Anelich was a member of the crew on said fishing vessel "Arizona"; except as hereinabove admitted defendants deny each and every other allegation contained in said Paragraph 4 of plaintiff's complaint.

V

Answering Paragraph 5 of plaintiff's complaint, defendants deny the same and the whole thereof.

VI

Answering Paragraph 6 of Plaintiff's complaint, defendants deny the same and the whole thereof.

VII

Answering Paragraph 7 of Plaintiff's complaint, defendants deny the same and the whole thereof.

VIII

Answering Paragraph 8 of plaintiff's complaint, defendants deny the same and the whole thereof.

IX

Answering Paragraph 9 of plaintiff's complaint, defendants deny the same and the whole thereof.

X

Answering Paragraph 10 of Plaintiff's complaint, defendants deny the same and the whole thereof.

XI

Answering Paragraph 11 of plaintiff's complaint, defendants state they have no knowledge or information as to the exact age of Mario Anelich at the time of his death, nor his [fol. 12] earning capacity, and that they further have no knowledge or information as to the marital relationship between himself and his wife, and therefore deny the above facts upon information and belief; as to all the other facts

set forth in Paragraph II of plaintiff's complaint, defendants deny the same, and expecially deny that plaintiff has been damaged in the sum of $35,000 or in any other sum, because of the negligence of these defendants.

XII

Answering Paragraph 12 of plaintiff's complaint, defendants deny the same and the whole thereof.

XIII

Answering Paragraph 13 of plaintiff's complaint, defendant- deny the same and the whole thereof.

And for further answer and by way of first affirmative defense, defendants allege:

That the damages, if any, by plaintiff sustained, were due to and caused by the carelessness and negligence of the deceased, Mario Anelich, which carelessness and negligence on the part of the deceased, Mario Anelich, contributed to and were the sole and proximate cause of the damages, if any, by plaintiff sustained.

And for further answer and by way of second affirmative defense, defendants allege:

That the damages, if any, by plaintiff sustained were due to and caused by risks naturally incident to the deceased's employment as a fisherman on the fishing boat "Arizona" that such risks were open and apparent and within the knowledge of the deceased, Mario Anelich, as an experienced fisherman and that therefore the deceased, Mario Anelich, assumed the risks.

Wherefore, having fully answered, defendants pray that plaintiff take nothing by her complaint herein, and that they have their costs and disbursements hereinafter to be taxed.

Ralph S. Pierce, Edmund Stafford, Edwin J. Cummins, Attorney- for Defendants.

[fol. 13] *Duly sworn to by Antone Mardesich. Jurat omitted in printing.*

Copy Received 2/20/34.

Chas. A. Wallace, by E. Lewis.

[File endorsement omitted.]

[fol. 14] [File endorsement omitted]

IN SUPERIOR COURT OF SNOHOMISH COUNTY

[Title omitted]

REPLY—Filed Feb. 28, 1934

Plaintiff denies each and all the allegations set forth in the first and second affirmative defense of defendant's answer to plaintiffs complaint.

Wherefore Plaintiff having fully replied to defendant's answer, prays judgment as prayed for in her complaint, herein.

Chas. A. Wallace, Attorney for Plaintiff.

Duly sworn to by Chas. A. Wallace. Jurat omitted in printing.

[fol. 15] Copy received. Date, Feb. 27th, 1934.

Ralph S. Pierce.

[File endorsement omitted.]

[fol. 16] [File endorsement omitted]

IN SUPERIOR COURT OF SNOHOMISH COUNTY

[Title omitted]

DEFENDANTS' REQUESTED INSTRUCTIONS—Filed Nov. 16, 1934

Come now the defendants above named, and request the Court to instruct the Jury to return a verdict for the defendants, and each of them, and not waiving the foregoing request, but insisting upon the same, in the alternative, the Defendants request the Court to give to the Jury the following instructions numbered from 1 to —, inclusive.

Ralph S. Pierce, Edwin J. Cummins, Attorneys for Defendants.

These numbered One (1) to Twenty four (24) inclusive requested in timely manner on behalf defendants and disposed of in manner indicated upon each.

Ralph C. Bell, Judge.

11/16/34.

[File endorsement omitted.]

[fol. 16½] Instruction No. 7

The law imposes upon the owner or master of a vessel the duty to use reasonable care in providing the employee with a safe place to work, and with reasonably safe tools and appliances. The employer does not, however, insure the safety of the working place in the sense that he is liable for all defects and danger. His duty is to exercise reasonable care and diligence in keeping it reasonably safe and if he discharges and meets that duty he is not liable for injuries that may occur from causes not traceable to his negligence.

Neither is the employer bound to furnish the very latest or most improved appliances, and if he furnishes such appliances as are generally and customarily employed in like work, and exercises reasonable care and diligence to see that they are kept in a safe working condition, he discharges his full duty under the law.

The employee, on the other hand, is held in law to assume the risk of all dangers which are necessarily inherent in the work and which are not traceable to his employer's negligence, whether he knows of such dangers or not, and whether they are open, obvious or apparent or not. This is upon the theory that he is presumed to be paid wages commensurate with the dangers necessarily incident to his employment. He also assumes the risks of all dangers which are actually known to him, or are so open, apparent or obvious that he should have discovered them by the reasonable use of his own senses, even though such dangers may be due to the employer's negligence.

Covered insofar as correct statement of applicable law by instruction given.

Ralph C. Bell.

11/16/34.

[fol. 17] Instruction No. 9

If you find from a fair preponderance of the evidence that the defendants were guilty of negligence as alleged in the complaint, and defined in these instructions, and that such negligence was the proximate cause of the injuries of the deceased, yet, if you further find that the deceased was guilty of contributory negligence, as that term has been defined to you, which said contributory negligence materially

or proximately contributed to his injury and death, such contributory negligence, if any, will not bar or prevent a recovery by the plaintiff; but in such event, the damages, if any, shall be diminished by the jury in proportion to the amount of negligence, if any, attributable to the deceased, so that the plaintiff will not recover full damages, but only a proportionate part bearing the same relation to the full amount as the negligence attributable to the defendants bears to the entire negligence attributable to both the deceased and the defendants.

Refused as covered by instruction given in form as requested on behalf plaintiff.

Ralph C. Bell, Judge.

11/16/34.

[fol. 18] In Superior Court of Snohomish County

[Title omitted]

Verdict—Filed Nov. 17, 1934

We, the jury duly empanelled and sworn in the above entitled cause, do find for plaintiff in the sum of Ten Thousand-five hundred dollars.

Dated this 17th day of November, 1934.

E. W. Hill, Foreman.

[File endorsement omitted.]

[fol. 19] In Superior Court of Snohomish County.

[Title omitted]

Motion for Judgment Notwithstanding the Verdict, and for a New Trial—Filed Nov. 19, 1934

Come now the defendants above named and move the Court for its Order granting Judgment for the said defendants, notwithstanding the verdict of the Jury heretofore rendered in said cause; and without waiving the foregoing Motion, but insisting upon the same, in the alternative said defendants, being the parties aggrieved, move the Court

for its Order granting a New Trial on the following grounds, which materially affect the substantial rights of said parties:

1. Irregularity in the proceedings of the Court, Jury or adverse party, by which such defendants were prevented from having a fair trial.

2. Misconduct of the prevailing party or jury.

3. Accident or surprise which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the defendants, which could not with reasonable diligence have been discovered and produced at the trial.

[fol. 20] 5. Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice.

6. Error in the Assessment of the amount of recovery.

7. That there is no evidence or reasonable inference from the evidence to justify the verdict, and that it is contrary to law.

8. Error in law occurring at the trial and excepted to at the time by the defendants.

This Motion is based upon the records and files herein, and defendants reserve the right to file affidavits hereafter in support of said Motion.

Dated this 19th day of November, 1934.

Ralph S. Pierce, Newton & Newton, Edwin J. Cummins, Attorneys for Defendants.

Copy Received 11/19/34.

Chas. A. Wallace, by Patteson.

[File endorsement omitted.]

[fol. 21] IN SUPERIOR COURT OF SNOHOMISH COUNTY

[Title omitted]

ORDER DENYING MOTION FOR JUDGMENT, ETC.—Dec. 8, 1934

Motions of Defendant for Judgment N. O. V. and for new trial. Denied. On motion of Defendant bond fixed at $12,500.00 on appeal supersedeas.

[File endorsement omitted.]

[fol. 22] [File endorsement omitted]

IN SUPERIOR COURT OF SNOHOMISH COUNTY

No. 32185

JUDGMENT—Filed Dec. 14, 1934

This cause came on regularly to be heard in the above entitled Court on the 13th day of November, 1934, plaintiff being present in Court and represented by her counsel, Charles A. Wallace and Wilbur Zundel, and the defendants being present in Court and represented by their counsel Ralph Pierce and Newton & Newton, and the parties being ready for trial, a jury was called and duly empaneled and sworn to try said cause, and thereupon taking of testimony was commenced, and not being concluded on said day was continued and testimony thereafter from day to day until the 16th day of November, 1934, the testimony was concluded, the jury duly instructed and the cause argued by counsel for the respective parties and submitted to the jury, and thereafter on the 17th day of November, 1934, the jury returned into Court with their verdict in favor of the plaintiff and against the defendants, and each of them, and the communities existing between the several defendants, in the sum of $10500.00, and thereafter Motion for Judgment Notwithstanding the Verdict and in the alternative for a New Trial was made by the defendants, and thereafter on the 8th day of December, 1934, the above entitled [fol. 23] Court heard arguments of counsel for and against

said Motions, arguments having been concluded and the Court being fully advised in the matter denied each and both of said motions, and thereupon the Court of its own motion suggested that in as much as the verdict being in a lump sum and, under the law, for the use and benefit of the widow and children, suggested that the amount awarded in said cause be apportioned as follows: (R. C. B.) and made apportionment as follows:

$2500.00 to Tony Anelich, minor son, age 11 years, 6 months, 11 days;

$2000.00 to Mary Anelich, minor daughter, age 12 years, 6 months 10 days;

-500.00 to Romalda Anelich, minor daughter, age 19 years. 7 months 15 days.

and the balance of said verdict viz $5,500.00 to Antonia Anelich, widow of said deceased age 40 years.

Now therefore, it is

Ordered, adjudged and decreed that the plaintiff do have and recover of and from said defendants, and each of them, and their respective marital communities, judgment in the sum of Ten Thousand Five Hundred ($10,500.00) Dollars, together with interest thereon at the rate of six per cent per annum from the 17th day of November, 1934, together with her costs and disbursements herein expended, and it is further

Ordered, adjudged and decreed that the foregoing judgment is hereby declared to be a first and prior lien against the Purse Seine Fishing Vessel "Arizona", Official register number 212882, her engine, hull, tackle, nets, seines, apparel and furniture.

It is further ordered, adjudged and decreed that the plaintiff, or her attorneys, be, and they are hereby authorized permitted and directed to collect and receive the total amount due under said judgment and to satisfy said judg-
[fol. 24] ment of record; plaintiff to account for the above portions of the named minors in Probate Cause No. 10720 of this Court (R. C. B.)

Done and ordered in open court this 14 day of December, 1934.

Ralph C. Bell, Judge.

Presented by: Chas. A. Wallace, Attorney for Plaintiff, 931 Republic Bldg., Seattle, Washington.

12/13/34.

Copy received but not approved.

Ralph S. Pierce, Edwin J. Cummins, Attys. for Defendants.

To all of which defendants except in open Court and Exception is hereby allowed.

Ralph C. Bell, Judge above Court.

12/14/34.

[File endorsement omitted.]

[fol. 25] In Superior Court of Snohomish County

[Title omitted]

Notice of Appeal—Filed Dec. 14, 1934

To: Antonia Anelich, as Administratrix, plaintiff herein and to Charles A. Wallace and Wilbur Zundel, her attorneys:

You, and each of you, will please hereby take notice that the defendants above named do hereby appeal to the Supreme Court of the State of Washington from that certain Judgment made and entered in the above entitled action on the 14th day of December, 1934, wherein plaintiffs were granted judgment against the above named defendants.

This appeal is from the whole of said judgment.

Ralph S. Pierce, Edwin J. Cummins, Attorneys for Defendants.

Copy received Dec. 14th, 1934, Chas. A. Wallace, Attorney for Plaintiff.

[File endorsement omitted.]

[fols. 26 & 27] Supersedeas bond on appeal for $12,500, filed Dec. 14, 1934, omitted in printing.

[fol. 28] IN SUPREME COURT OF WASHINGTON

No. 25626. Department Two

ANTONIA ANELICH, as Administratrix of the Estate of Mario Anelich, Deceased, Respondent,

v.

Purse Seine Fishing Vessel "ARIZONA," her engine, hull, tackle, nets, seines, apparel and furniture; Antone Mardesich and Jane Doe Mardesich, his wife; Peter Mardesich and Jane Doe Mardesich, his wife, Appellants

OPINION—Filed Sept. 5, 1935

This is an action brought under the Jones act to recover damages resulting from the injury and death of plaintiff's intestate while hauling in a purse line by means of a power winch on the purse seine fishing vessel, Arizona. The vessel, its owner, Antone Mardesich, and its master, Peter Mardesich, were all made parties defendant. The action is predicated upon the negligence of the defendants in that: (a) The clutch on the winch, by which it was connected and disconnected with the drive shaft, was old, worn and defective; (b) defendants failed to exercise reasonable care in providing medical attendance and hospitalization for deceased after he was injured.

The defendants joined issue, denying negligence and setting up, by way of affirmative defenses, contributory negligence and assumption of risk. The court submitted the case to the jury on the issues of negligence and contributory negligence, but declined to submit the defense of assumption of risk, holding, as a matter of law, that such defense was not available to defendants under maritime law. The jury returned a verdict for plaintiff in the sum of $10,500. From judgment on the verdict, defendants appeal, making fifteen assignments of error. We shall attempt [fol. 29] to discuss these in what appears to us to be the order of their importance.

In respect to assumption of risk, we understand appellants to contend (a) that the common law doctrine of assumption of risk has always been applicable to torts at sea; (b) that if not, it has been made so by the terms of the Jones act.

It is too well settled for discussion that the vessel and its owners are liable for indemnity, under general maritime law, for injuries sustained by seamen in consequence of a failure to supply and keep in order proper appliances appurtenant to the ship. For failure to do so, the ship and owner, not the seamen, assume the risk. The Osceola, 189 U. S. 158; Cricket S. S. Co. v. Parry, 263 Fed. 523; Storgard v. France & Canada S. S. Corporation, 263 Fed. 545; Henry Gillen's Sons Lighterage v. Fernald, 294 Fed. 520; Grimberg v. Admiral Oriental S. S. Line, 300 Fed. 619; Grant v. United States Shipping Board Emergency Fleet Corporation, 22 F. (2d) 488; Howard v. United States Shipping Board Emergency Fleet Corporation, 24 F. (2d) 374; Ives v. United States, 58 F. (2d) 201.

The argument that the common law doctrine of assumption of risk is made available as a defense by the Jones act is this: That act, by its terms, provides that the seaman, or, in case of death, his personal representative, may maintain an action at law, in which case, "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply." Title 46, U. S. C. A., § 688. The argument proceeds: Since the doctrine of assumption of risk is available under the Federal Employees Liability act, it is, by reason of the above stated terms of the Jones act, made available in actions brought by seamen. The position of appellants is against reason and authority. Hansen v. [fol. 30] United States, 12 F. (2d) 321; States S. S. Co. v. Berglann, 41 F. (2d) 456. The effect of the Jones act was to enlarge, rather than restrict, the rights of seamen injured in the course of their employment. Its avowed purpose was to afford them an action at law, with a right of trial by jury—a right which they did not have in admiralty. The act does not purport to change the rules of maritime law, by which their rights were theretofore determined. The result, if appellants' position were accepted, would be to defeat the very right granted by the Jones act. For, the injured seaman would hardly hazard the chance of his action at law being defeated under the doctrine of assumption of risk, when he could go into admiralty and escape the hazard of that defense.

Appellants contend that, in any event, there was no causal connection between the defective clutch and the in-

jury sustained by plaintiff's intestate. The crew, with the exception of the engineer, were Slavonians, and ordinarily used their native language about their work. The engineer did not understand the Slavonian language. The winch was located about midship. It had two drums—forward and aft. Near the forward drum was a lever by which the clutch of the winch was engaged and disengaged from the drive shaft. The shaft was driven by a semi-Diesel engine, which furnished all the power for the vessel. There was a clutch at the engine designed to engage and disengage all machinery, including the propeller shaft.

At the time of the accident, the crew was engaged in hauling in the purse lines. There were two such lines which were brought onto the vessel through blocks attached to a davit. Thence, the lines extended to the aft and forward drums of the winch, respectively. Three or four turns of the line were had around the drum. A man pulling at the rope created the friction necessary on the drum to haul in the line. The deceased was so engaged on the aft line. He was heard to shout in his native tongue: "Oh, Mother of Mine, my leg is caught." The winch was stopped by the [fol. 31] engineer, who disengaged the clutch controlling all of the machinery at the engine. Before the machinery was stopped, however, deceased's leg was pulled onto the aft drum of the winch, where it was broken and crushed between the purse line and the drum. The leg was so firmly caught that, in order to release it, the line had to be cut from the drum with an axe. While there was conflict in the evidence, the jury were warranted in finding that the clutch was so old, worn and defective that it would slip out under the pull of a heavy load, unless the handle of the lever was so braced as to hold it. It was not denied that there was a forked stick kept tied to the starboard bitt of the winch for that purpose. It was used by placing the forked end against the handle of the lever, after the clutch was enmeshed, and the other end against cleats nailed onto the bitt. There was evidence to the effect that this stick was not being used at the time of the accident. We think, however, that there was sufficient circumstantial evidence for the jury to find that it was. The owner of the vessel was standing within a few feet of the clutch lever, yet he did not disengage the clutch. He shouted to the engineer, who stopped the winch by disengaging the clutch at the

engine. It is contended that the winch was stopped just as quickly in this manner as it could have been by disengaging the clutch at the winch. This, it seems to us, was for the jury to say. The engineer could not understand deceased's cry of distress. The owner of the vessel did. It is reasonable to believe that, had the stick not been used, he could and would have reached the clutch lever in the time it took him to call to the engineer. Had he done so, it is reasonable to believe that the winch could have been stopped before deceased's leg got wound up in the drum.

Appellants contend that the court erred in receiving evidence of the condition of the clutch at the time of trial, [fol. 32] some fourteen or fifteen months after the accident. An engineer, having just examined the clutch, testified that it was so worn and defective that it would not hold, under the pull of a heavy load, without pressure against the handle of the lever; that the forked stick was designed to exert the pressure on the handle necessary to hold the clutch enmeshed; that the condition of the clutch was the result of many years of use; and that, in his opinion, the clutch was in practically the same condition at the time of the trial as it was at the time of the accident. Conceding the testimony inadmissable, the error in receiving it was harmless. Another engineer testified that he examined the clutch a month after the accident and again at the time of the trial, and that its condition was the same.

It is also urged that the court erred in admitting in evidence a photograph showing the forked stick in place against the handle of the clutch lever. The assignment is without merit. The photograph was merely designed to show how the forked stick was used. It was not intended to serve as substantive proof of the fact that the stick was in use at the time of the accident. Gooschin v. Ladd, 177 Wash. 625, 33 P. (2d) 653.

It is also contended that Anelich was not a seaman, in contemplation of maritime law. This contention is not tenable. To be a seaman, within the contemplation of maritime law, a man's duties do not necessarily have to be concerned with the navigation of the vessel. Howarth v. United States Shipping Board Emergency Fleet Corporation, supra; Grant v. United States Shipping Board Emergency Fleet Corporation, supra.

Appellants next contend that the court should not have submitted to the jury the question of negligence in respect to the treatment and hospitalization of deceased after the accident. The argument is that, under the undisputed evidence, it appears that appellants did all that was reason-
[fol. 33] ably possible in respect to the obligation imposed upon them by law. The accident occurred about eight-thirty, A. M., August 1, in Mitchell bay—some fifteen miles from Friday Harbor. At the time, the cork line of the purse seine was all about the vessel. While in such a situation, the vessel could not be moved under its own power. Consequently, within fifteen or twenty minutes, the injured man was transferred to another fishing vessel, the Congress. Shortly after that, he was again transferred to a "fish buyer," the Excel II. The reason for the second transfer was that the Excel II was a faster boat. It proceeded to Friday Harbor, where it arrived about ten-thirty. There the wound of the injured man received attention for the first time, no attempt at first aid or aseptic treatment having theretofore been made, except the application of a tourniquet. The physician at Friday Harbor performed all the service that he was equipped to perform—cut away dead tissue, cleansed the wound, and placed the leg in a splint. Anelich remained in the physician's office until five-thirty, P. M., when he was picked up by a coast guard cutter and taken to the Marine hospital, in Seattle. He arrived there at ten-thirty, P. M. No operative treatment was attempted until the next morning. Two or three days later, general septicaemia developed, from which death resulted August 8.

It seems to us, under this evidence, the jury might very well find that adequate treatment and hospitalization was unreasonably delayed, and, but for the delay, Anelich's life might have been saved. But, appellants contend, under the evidence, the organisms which subsequently caused septicaemia entered the wound at the time of injury; that, consequently, to say that septicaemia resulted from delay in treatment is purely speculative. We think, however, that the jury might reasonably infer from the medical testimony that the longer the delay in effecting adequate aseptic treatment and hospitalization, the more likely is the develop-
[fol. 34] ment of septicaemia. See: Cortes v. Baltimore

Insular Line, 6 Fed. Supp. 604. In that case, the court said:

"If in this case we accept as established the fact of negligent conduct of the defendant and deny recovery on the ground of insufficient proof of causal connection with death, there will be left open a class of cases under a statute intended for the protection of the health and safety of seamen where neglect of duty can be admitted with impunity. The spirit of our jurisprudence, while fostering conclusiveness and certainty does not look with favor upon nurturing wrongdoing and denying a remedy. The nearest approximation to reasonable justice in this case necessitates the denial of the motion to dismiss."

As to what might be required in the exercise of reasonable care in respect to treatment and hospitalization, the court admitted evidence concerning the distance of Victoria and Bellingham from the place of the accident; also, evidence of the possibility of transporting the injured man by airplane to the Marine hospital at Seattle. This was all competent, under the rule of maritime law, as stated in Whitney v. Olsen, 108 Fed. 292:

"There is no law which requires the presence of a physician or surgeon on board a vessel like the Uranus. But it was admitted by the master, and is not denied by appellants, that, in case of a serious injury to a seaman, it is the general custom for the master to take the ship into the nearest port when there is no surgeon on board. In fact, it was clearly his duty to do so, unless the facts and circumstances relied upon by appellants are of such a character as to justify him in the course he pursued. In discussing these questions, it must be borne in mind that the rules which govern and control them must be determined, not from the municipal law, but by the maritime law. The maritime law furnishes entirely different principles upon many subjects from the common law. Seamen are entitled to different rights from men on land. * * *

"Under the maritime law it is well settled that a seaman who receives an injury while in the service of the ship is entitled to medical care, nursing, and attendance, and to a cure, so far as cure is possible, at the expense of the ship."

Appellants argue that, since the Arizona followed the Excel II to Friday Harbor as speedily as possible, and since they made every effort to contact the coast guard (which was the usual method of getting injured seamen from that locality to the Marine Hospital), they fulfilled their obligation to care for Anelich after his injury; that to fulfill such obligation they were not required to provide airplane ambu- [fol. 35] lance service. Of course, as a matter of law, they were not required to furnish airplane ambulance service. But the evidence showed that the place of the accident was but an hour by airplane from Seattle; that airplane service was available. Under the evidence, the jury might well have concluded that, by such service, Anelich could have reached the Marine hospital within three or four hours after the accident. That appellants did all that they thought of in taking care of the injured man is not determinative of their obligation. Whether they acquitted themselves of their obligation in this respect was, under the facts and circumstances disclosed by the record, a question for the jury. See: The C. S. Holmes, 237 Fed. 785; Brown v. Overton, Federal Case No. 2,024 (4 Fed. Cas. 418).

Appellants urge that the court erred in submitting, as an element of damages, pain and suffering endured by Anelich between his injury and death. Counsel make an interesting argument in support of this position, but, since the pertinent authorities are to the contrary, we do not feel it is necessary to state or analyze the argument. Luckenbach S. S. Co. v. Campbell, 8 F. (2d) 223; Thornton v. Puget Sound Power & Light Co., 49 F. (2d) 347. In the former case, speaking for the Ninth Circuit Court of Appeals, Judge Rudkin said:

"If the recovery must be limited to the pecuniary loss to the estate, the allowance would seem liberal, to say the least, but the statute on which the action was based is a survival statute, under which there may be a recovery for pain and suffering. St. Louis & Iron Mt. Ry. Co. v. Craft, 237 U. S. 648, 35 S. Ct. 704, 59 L. Ed. 1160."

Judgment affirmed.

Blake, J.

We concur: Steinert, J. Holcomb, J. Mitchell, J.

[fol. 36] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed Oct. 25, 1935

The court having considered appellants' petition for a rehearing herein;

It is ordered that the petition be and it hereby is denied.

Dated this 25th day of October, 1935.

By the Court.

William J. Millard, Chief Justice.

[File endorsement omitted.]

[fol. 37] IN SUPREME COURT OF WASHINGTON

No. 25626

Snohomish County No. 32185

ANTONIA ANELICH, as Administratrix of the Estate of Mario Anelich, Deceased, Respondent,

vs.

Purse Seine Fishing Vessel "ARIZONA" her engine, hull, tackle, nets, seines, apparel and furniture; Antone Mardesich and Jane Doe Mardesich, his wife; Peter Mardesich and Jane Doe Mardesich, his wife, Appellants

JUDGMENT—October 25, 1935

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Snohomish County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 25th day of October, A. D. 1935, on motion of Wilbur Zundel, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said Antonia Anelich, as Administratrix of the Estate of Mario Anelich, deceased, have and recover of and from the said

Purse Seine Fishing Vessel "Arizona", her engine, hull, tackle, nets, seines, apparel, and furniture; and Antone Mardesich and Jane Doe Mardesich, his wife, and Peter Mardesich and Jane Doe Mardesich, his wife, and their respective marital communities, and from General Casualty Company of America, of Seattle, Washington, surety, the sum of Ten Thousand Five Hundred and no/100 Dollars ($10,500.00) with interest at 6% per annum from November 17, 1934, and costs, with interest at the rate of 6% per annum from December 14, 1934, and the costs of this action taxed and allowed at One Hundred Eleven and 90/100 ($111.90) Dollars, and that execution issue therefor.

[fol. 38] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER STAYING ISSUANCE OF REMITTITUR—Filed Oct. 30, 1935

Upon application of counsel for Appellant and good cause therefor appearing,

It is ordered that the issuance of the Remittitur of this Court in the above cause be and hereby is stayed to and including the 31st day of December, 1935, and in the event the petition for a Writ of Certiorari to be made by the Appellant herein be docketed in the Clerk's Office of the Supreme Court of the United States on or before said date, then the Remittitur of this Court is to be stayed until after the said Supreme Court of the United States passes upon said petition.

William J. Millard, Chief Justice.

Dated at Olympia, Washington, 30th day of October, 1935.

[File endorsement omitted.]

[fol. 39] IN SUPREME COURT OF WASHINGTON.

[Title omitted]

PRÆCIPE FOR RECORD—Filed Oct. 30, 1935

To the Honorable Benjamin T. Hart, Clerk of the Supreme Court, Olympia, Washington:

Will you please prepare and certify for use on application for Certiorari in the Supreme Court of the United States to the Supreme Court of the State of Washington, in the above entitled case, the following documents:

From transcript on appeal:

1. Complaint.
2. Answer.
3. Reply.
4. Defendant's Requested Instruction No. 9.
5. Verdict of the Jury.
6. Motion for Judgment for Defendant, notwithstanding the verdict or in the alternative for New Trial.
7. Order denying motion for judgment notwithstanding verdict and for new trial.
8. Judgment.
9. Notice of Appeal.
10. Bond on Appeal.
11. Statement of Facts.

From Supreme Court Docket:

a. Opinion of Court.
b. Order Denying Petition for Rehearing.
c. Judgment of Supreme Court.
d. Order Staying Remittitur.
e. Præcipe for Record.

The instructions of the Court to the jury have been omitted from the foregoing transcript on appeal to prevent duplication, as they are contained in the statement of facts; [fol. 40] which is to be set out in full.

Respectfully, Ralph S. Pierce, Edwin J. Cummins, Gordon H. Sweany, Attorneys for Appellants.

Service of the foregoing Præcipe for Record accepted this 29th day of Oct., 1935.

Wilbur Zundel, Attorney for Respondent.

[File endorsement omitted.]

[fol. 40a] IN SUPREME COURT OF WASHINGTON

SUPPLEMENTAL PRÆCIPE—Filed Dec. 2, 1935

Ralph S. Pierce, Lawyer

White Building, Seattle

November 29, 1935.

Mr. Benjamin T. Hart, Clerk of the Supreme Court, Olympia, Washington.

DEAR SIR:

Re Anelich v. Mardesich, No. 25626

We are sending you by express today the transcript of the record on appeal to the Supreme Court of the United States in the above case. There is one alteration which we would like to make in the transcript. In our praecipe, we ask that requested instruction No. 9 be set forth; and the instruction as set forth by you is not the one in which we were interested. Apparently the copy of the Defendant's requested instruction, which we have in our file, is not numbered the same as the official copy on file with you.

The instruction in which we are interested and which we wanted pursuant to the request by us of Instruction No. 9, begins as follows: "The Law imposes upon the owner or master of a vessel, the duty to use reasonable care in providing the employee with a safe place to work and with reasonably safe tools and appliances The employer does not, however, insure the safety of the working place in the sense that he is liable for all defects and danger." It is an instruction upon the question of assumption of risk and contains two paragraphs.

Will you kindly treat this letter as an additional praecipe, if that be necessary, and substitute the instruction, a part

of which we have set forth in this letter, in place of Defendant's requested instruction No. 9, as set forth by you in the transcript? We would appreciate it if you would do so and notify us as to what number the instruction really bears. I understand that it will take a day or two at least, for you to compare and certify this transcript. By that time we will have the manuscript of our petition and brief ready, and about the middle of next week, (December 4th) I will be in Olympia with the manuscript so that we can send the manuscript and the transcript in together to be printed by the Clerk of the Supreme Court of the United States.

Enclosed you will find a check in the sum of $79.40 to cover your fee for preparation of the transcript.

Very truly yours, Ralph S. Pierce.

[File endorsement omitted]

[fol. 40b-43] [Title omitted]

[File endorsements omitted]

[fol. 44] IN SUPERIOR COURT OF SNOHOMISH COUNTY

Statement of Facts Filed Jan. 10, 1935; Filed in Supreme Court May 10, 1935

RULING ON MOTION FOR CONTINUANCE

September 8th, 1934, 10:10 o'clock A. M.

The Court: The course of this case has been unusually vexatious. At least a half dozen times informally, or otherwise, counsel for these respective parties have been before me arguing with each other as to what they had agreed upon, or had not agreed upon.

Since taking this bench this morning to hear the motion for continuance noted for today I have examined my own desk calendar, or docket, and the entries made thereon as for the 29th day of March, 1934, as such bear upon this disputed question of what was the stipulation of the respective counsel made outside of court relative to the trial of this case. There are no minute entries in the Clerk's records of proceedings in this court and cause had in March or

April, 1934. It has been mentioned by counsel, and it is in my own mind, that this case was first set for some date in the month of March prior to the 29th day of March, though I have no entry anywhere to bear this out. My recollection is, however, that that earlier setting in the month of March was vacated upon the appearance of some of counsel here and a setting made of this case for the 29th day of March as the last case upon the jury docket for that month of 1934, and with the understanding that a jury would be empanelled on that day, the 29th of March, though the actual trial of the cause would be had in the next week commencing on the third day of April, 1934. Now, I get this date, third day of April, 1934, not from any entry I have made or any entry [fol. 45] in the minutes of this court's proceedings, but from the affidavits that are in the files and referred to in support of this motion for continuance.

The entry that I have made upon this desk docket of mine as for the 29th day of March, 1934, is this: "Anelich vs. Steamboat, jury to be empanelled, continued by stipulation to December", and an arrow would indicate that this entry was intended to have been made as for the 28th day of March. Counsel may examine it.

Now, Mr. Stafford in affidavit filed says that he was in this court on the 3rd day of April, 1934, and informed me as the judge presiding that there had been stipulation that cause would not be tried until after the middle of the month of November, 1934 at the close of the fishing season.

There is in these files a letter from one Edwin J. Cummins, an attorney, associated in this cause in some capacity, under date of May 1st, 1934 addressed to the Clerk of this Court and reading as follows:

"Mr. Charles Wallace, the attorney for the plaintiff, was in to see me today. He informed me that there is a jury to be called on May 7 and that he wanted the above case set at that jury term.

"You will recall we had agreed to a setting of this case on April 3",—which is the date I have referred to as the date of trial even though jury was to be empanelled on March 28th or 29th,—"and that due to the fact that Mr. Wallace was not prepared to try it at that time, he then agreed that the case would go over until December. This is a suit for personal injuries for a man's death on a boat. Since April 3 the witnesses have scattered and many of them

are now in Alaska. We cannot, of course, go to trial in this case until December.

"At the time Mr. Wallace asked that the case be continued from the April 3 setting we informed him that the case could not possibly be tried before December if it were not tried then. The reason I write at this time is that I do not want the case set at this coming jury term for the above reasons, [fol. 46] and if Mr. Wallace wants to contest the matter we will produce the necessary affidavit for the continuance."

Of course, I do not know how much of merit Mr. Cummins attaches to a letter to the Clerk of the Court. It is part of the confusion and the demoralization of this case.

The Clerk has just laid upon my desk further letters to him which serve to corroborate and substantiate what I have been saying relative to the setting of this cause for trial on April 3rd, the jury to be empanelled earlier. Here is a letter from Mr. Cummins dated March 20th, 1934, reading as follows:

"You will recall that I had the setting of this case before Judge Bell on March 19. The judge agreed that if both counsel would be present on the morning of March 28"—(I have indicated that my entry on my desk docket though appearing under the date of the 29th has arrow pointing to the 28th)—"he would allow them to select a jury from the full panel, to return at an agreed later date. This morning Mr. Charles Wallace, attorney for the plaintiff, agreed to the arrangement that we both be present on March 28, for the selection of the jury and that the trial be on April 3, 1934.

"Kindly advise if these arrangements are satisfactory with the Court."

The Clerk's reply to that letter is here dated March 21st, 1934:

"The arrangements suggested in your letter as to the above entitled cause are satisfactory, excepting that no Demand for Jury has been filed and no jury fee paid. We suppose these details will be taken care of before the date mentioned, March 28th."

I would have had much less difficulty, I presume, if I had been put to preside in the trial of this case than I have had

to settle these differences of counsel; but these things I have mentioned here indicate to me and satisfy me that it was the stipulation of counsel made outside of court orally, [fol. 47] and not in writing as it should have been, that this case be for trial in December, 1934; in any event, later than about the middle of November, 1934.

Of course, I do not know whether there will be a jury here in November, or in December, at this time. In the light of past experiences there is quite apt to be a jury in attendance in one of those months, but court dockets are not what they used to be here and we do not have juries every month, or all the time, as you folks are used to having in Seattle. Personally, I do not care when this case is tried, whether this month, or in November, or in December. It simply is another case to me. But in the light of what this record discloses I feel that fair dealing and common honesty requires that this continuance be granted until the next jury term of this court. Now, please understand again, I do not know whether that will be November or December. We call a jury here when we think we have work for a jury to do, and that is the law of the state.

I do not know whether counsel for the defendants is going to insist rigidly and tightly upon what I have announced was the stipulation that this trial be had in December. It has been indicated to me here by that very counsel this morning that on some date following the 10th of November this trial could be had, even in the month of November.

In order that we may have no further necessity of trial of these wholly collateral things of what was agreed upon I would venture to suggest that it be now stipulated right here in open court that this cause may have setting for [fol. 48] trial at the next jury term, whether that be in November later than the 10th, or December next.

Mr. Pierce: That is entirely agreeble to us, may it please the Court.

The Court: Then it is the stipulation of counsel here now in open court that this cause may be assigned for trial at the next jury term on any date following and later than the 10th day of November next.

Mr. Pierce: That is agreeable to the defendant.

Mr. Wallace: Of course, no copies of those letters were sent to me, Your Honor.

The Court: I assume not; and that is the way the lawyers practice law is to write the Clerk, or that one's deputy, or stenographer. I never read anything in the books about doing it that way. We have too much ease of correspondence nowadays. Every one of us knows when something is stipulated on outside of court the law is, and always has been, that it shall be in writing. Of course, that does not mean to me it has to be under seal.

Mr. Pierce: In view of the stipulation in open Court I take it there is no necessity for formal order.

The Court: I take it not. This stipulation is going in these minutes. I will file in this cause the letters that I read from in this statement that I have made, and this statement will be a part of this record in event a record is ever made.

(Concluded at 10:30 o'clock A. M.)

[fol. 49] October 8th, 1934, 10:20 o'clock A. M.

RULING ON MOTION FOR APPOINTMENT OF RECEIVER

The Court: This action was commenced by the filing of complaint in this court on the 16th day of October, 1933. It is one for damages alleged to arise from wrongful acts complained of causing the death of that one the administratrix of whose estate the plaintiff is.

In the course of proceeding it was attempted to remove this cause to the United States District Court. Such proceedings were in that court had and resulted in the remand of the cause to this court, and in the order of remanding the cause it is adjudicated that insofar as this action is in rem in this court, it has become in the language of the District Judge "dead", and is under law not removable to the Federal Court insofar as it is an action in personan. This is the law of this case, declared by a court of jurisdiction to make the decision. Thus, we have here now before us in this court a cause strictly in personan for the recovery of alleged unliquidated damages.

Although long at issue, and although having been twice assigned trial dates, the cause is still untried, and is subject now to assignment for trial in the month of November

next. On September 13th last there was filed in this court and instituted in this action proceedings looking to the appointment by this court of a receiver of or for the vessel whereon it is that it is alleged the death injuries were suffered. This matter of the application for appointment [fol. 50] of a receiver came before this Court two weeks ago today. It was then the position of the plaintiff's counsel that by virtue of statutes of this state, especially Secs. 1182 to 1187, read in connection with Secs. 1173, 1208 and 1209, all of Rem. Rev. Stat., the plaintiff had the absolute right as a matter of law and of statute to the appointment of a receiver. That position is today abandoned, and reliance as to the right to have a receiver named is placed upon Sec. 740 and 741 Rem. Rev. Stat. and upon the discretionary power of this court that is inherent or vested in it by those sections.

The question is a somewhat troublesome one. There does not seem to be available any decisions of the highest court of this state that are decisive. The sections of the statutes referred to seem to be in some measure uncertain and difficult of being interpreted to concisely cover the matter. Sections 1182, et sec., which purport to provide for a lien upon steamers and vessels and their tackle, among any other things for injuries committed to persons or property, or while transporting persons or property to or from this state, seem to contemplate proceedings in rem as well as in personan.

I am of opinion that the plaintiff here by virtue of Sec. 1182 has alleged those facts which give rise to lien upon this vessel and its tackle. That lien is one of the statutorily provided liens that requires no formal claim or demand of lien to be filed in any office or in any wise made a part of the public record. No action or effort on the part of [fol. 51] the plaintiff is required to initiate the lien. The statute initiates it and preserves it for the period of three years from the time the cause of action accrues. That lien is, and must be, looked upon as something different in its legal aspects that the mere inchoate right of lien which exists, in those instances whereunder statutes a formal claim of lien must be filed within some designated period, as for instance within eight months after cessation of labor by a mechanic, or the furnishing of materials by material men. It must be recognized, and even though this action

now is purely in personan, the claim or the demand made in the complaint is a lien by pure operation of statute. This lien, in event plaintiff prevails and recovers verdict and final judgment, must result in that judgment itself continuing the lien, even though there be no formal foreclosure of it in this action. In other words, this vessel and its tackle is in the very nature of things subject at this time to lien and will continue subject to that lien in the event plaintiff recovers.

It is argued, or stated, by counsel for defendant that there is insurance policy which covers the alleged losses of plaintiff in whole or in part. Nothing in the record establishes such; but granting that there is such, that can in no wise deprive plaintiff of any lien the law gives her nor can it impair at all such law-given lien of plaintiff, or any right of plaintiff as the holder and beneficiary of such a lien. It is also argued as against the contentions of plaintiff for the appointment of a receiver that the period of pendency of this cause, as has been recited, and the other proceed- [fol. 52] ings that the record discloses are proper to be considered now as affecting any right of plaintiff to appointment of a receiver. It is argued that it is to be inferred that the application that is now before this Court for appointment of a receiver having been thus long delayed while this vessel and its tackle have been subjected to the risks and dangers of the sea and of fire that are now relied upon as risks and dangers that invoke the exercise of discretion, manifest that this application is made not in good faith but rather to hinder, and to vex, and to annoy the defendants at this immediate time. I do not feel warranted in accepting either one of these arguments as controlling in the matter. The plaintiff in the nature of things has given her by statute a lien upon that nature of property, vessel and tackle, which if put to use is of necessity, subject to hazards that all of us recognize and know; but the fact alone that plaintiff has been willing until now to herself assume, or bear, so far as any lien she may have, those risks and those hazards, does not defeat her when she would protect the subject matter of her lien, when she would elect not longer to carry the risks and the hazards that she had carried before.

I do not think that Subdivision 3 of Sec. 741 relative to when it is that a receiver may be appointed is applicable,

or that we fall within it in this case. It is that "In all actions where it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed or materially injured" a receiver may be appointed. But this vessel, and her tackle are not property, [fol. 53] funds, or rents and profits in controversy. The vessel and her tackle are at most property which plaintiff by virtue of Sec. 1182, et seq., has lien upon. The vessel and her tackle are not in controversy. That which is in controversy is the question of whether the defendants wrongfully caused the death, and what, if anything, the plaintiff shall recover as damages for the injury she sustained thereby.

Subdivision 6 of Sec. 741 is that a receiver may be appointed as follows: "And is such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties." While this is broad and comprehensive language of a statute declaring that judicial discretion may have claim and operate, it is not to be taken as any license, or authority, to seize by receivership a vessel and tackle which is the property, though subject to lien, of another one, or ones, who are not to be said within reason to be unable to meet the demands against them, especially where issues have been raised and are untried that go to the very existence of any demand.

The Supreme Court of this state has in numerous cases, the titles of which I am not able now to recall but which may readily be found, held that receivers will not be permitted to be named for individuals not partners and insolvent. Indeed, it has almost been declared that in no instances a receiver for the property of an individual, or individuals, not contested between each other as partners shall be named. [fol. 54] The question in my own mind under this Subdivision 6 resolves itself into this: whether I am to say in sound discretion that it is necessary to secure ample justice, and this upon this record, that this boat, this vessel, and her tackle be taken into this Court's possession through a receiver, and thus the subject matter of plaintiff's lien be preserved as against the hazards of operation of the vessel in fishing. Such action, of course, would result in the deprivation of the defendants of use of the vessel for the remainder of this fishing season which I am told terminates

on November 10th, unless such ones obtain release of the vessel by a filing of some security to stand in lieu of the vessel, which I understand may be done legally. I am not inclined to grant the appointment of this receiver in the light of this entire record, and the nature of the demand, unliquidated as it is and depending upon preponderating proof of negligent or wrongful acts as the cause of death, though I am quite mindful of the fact that what I may call great risk of the subject matter of this lien is inherent in the ordinary uses of that subject matter; this especially in the absence of any showing that these individual defendants are unable to respond and to meet the obligation of any verdict or judgment against them. You know this is quite a different situation than if plaintiff were here with a liquidated demand for the unpaid and agreed purchase price of an engine placed within that boat, and which has become a part of it. Plaintiff is here with that always-uncertain nature of claim that exists in alleged damages sus-
[fol. 55] tained by reason of wrongful or negligent act causing death of one, and liability for that act, and the existence of that act denied, subject only to be established by proof at the trial, and I deny the application for a receiver.

I will inform counsel at this time that we expect there will be a jury here in November. I do this because of the troubles we have known in this case to this stage before trial of it.

(Discussion between counsel.)

The Court: I am willing this record may show that it is stipulated this case be set for trial on the 13th day of November.

[fol. 56] IN SUPERIOR COURT

[Title omitted]

CAPTION

Be it remembered that on the 13th day of November, 1934, at the hour of 9:30 o'clock A. M., the above entitled and numbered cause came on for trial before the Honorable Ralph C. Bell, one of the Judges of the above entitled Court, sitting in Department No. 1 thereof, at the Snohomish

County Court House in the City of Everett, County of Snohomish and State of Washington; the plaintiff appearing by her attorneys, Mr. Charles A. Wallace and Mr. Wilbur Zundel, and the defendants appearing by their attorneys, Mr. Ralph S. Pierce, Mr. Edwin J. Cummins, Messrs. Newton and Newton and Mr. Gordon H. Sweany (by Messrs. Pierce, Clifford Newton and Sweany); both sides having announced they were ready for trial; a jury was then and there duly empanelled and sworn to try said cause; and

Whereupon the following proceedings were had and testimony given, to-wit:

[fol. 57] November 13th, 1934, 10:30 o'clock A. M.

PLAINTIFF'S OPENING STATEMENT

Mr. Wallace: Your Honor, and Ladies and Gentlemen of the Jury: We will show you by the evidence in this case that on the first day of August, 1933 the deceased husband of this plaintiff, Mrs. Anelich, was engaged as a fisherman on the Fishing Vessel "Arizona". They were then fishing early in the morning at Mitchell Bay, somewhere near the northern part of the San Juan Islands. They had made a few hauls that morning, when they were taking in the Purse line after making a haul and Anelich was pulling on one end of the line that wound around the winch to keep it tight from friction; that the deck of the vessel, the hatch upon which he was standing, was wet and slippery and slick; he had on rubber boots, and he fell down; his feet slipped from under him; and his foot got caught into a bit of the line that was coming in; that Mr. Mardesich was on the bridge of the vessel; Mr. Mardesich was and is the owner of the vessel, although he was not then fishing as a member of the crew; his son, Pete, was the Master; that this man's leg was wound around that winch, or what we call the "nigger head", and was broken in several places, or severely injured. I think the bone was broken in about twelve places.

He was then put upon a mattress and transferred by small boat to the "Congress," which was a boat about the same size and practically the same speed as the "Arizona". There were a number of vessels around there at that time. the "Congress" took Mr. Anelich out until they got out of [fol. 58] this group of vessels, when he was transferred to

the "Excel II", what they call a buyer, or cannery tender, and was brought into Friday Harbor.

He was hurt at approximately eight-thirty in the morning. They arrived in Friday Harbor at about ten thirty, two hours later, where he received first aid treatment from Dr. Sturdevant, and remained there in Dr. Sturdevant's office at Friday Harbor (there is no hospital in Friday Harbor) until four-forty-five or five o'clock in the evening, when the Coast Guard vessel picked him up and took him to Seattle where he was transferred to the Marine Hospital.

That night about ten-thirty or eleven o'clock, some approximately fourteen hours after he was injured he arrived at the Marine Hospital, where he was treated. He developed what the doctors call septicemia, or what we know as blood poisoning or gangrene, and died on the 8th of August at the Marine Hospital.

We will show to you, Ladies and Gentlemen, that this man was injured, that his leg was broken, as I have stated to you, because the machinery and equipment of that vessel was old and worn out and defective and faulty, contributing directly to, and directly causing the injury in that because of its worn out condition they could not stop it in time to prevent him from breaking his leg and his going into the winch. We do not think it is necessary at this time to go into the minute details as to how that happened because the evidence will detail it, and perhaps better than I can show it to you.

[fol. 59] DEFENDANT'S OPENING STATEMENT

Mr. Pierce: May it please the Court, and Ladies and Gentlemen of the Jury: So that you may have in mind throughout the trial of the case the issues in this case we are going to outline to you now our position. You will find during the jury term that ordinarily attorneys wait until they open their case; my own precedent has been, in order to enable the jury to follow the testimony more easily, to make my opening statement now. I think it is easier to know what each side is contending in advance.

This accident happened on August first, 1933 on the fishing boat "Arizona", which is owned by Everett people and operated, and has been for many years operated, out

of Everett. It was operated by a crew of I have forgotten whether it was six or seven or eight men, but with the regulation crew. It started on the cruise in May of that year. The crew was the same at the start as it was at the finish. In other words, each one of the men on this boat on the day of the accident was doing the identical work that he had been doing throughout the summer.

The evidence will disclose that in the particular operation that was being performed on the day the accident occurred, the same men had worked all season, and that it was being performed this day by the same men in the same manner with the same machinery the same as it had been performed approximately somewhere between 135 and 150 times during the fishing season. Upon the boat this day was the regular crew; Pete Mardesich was the Master, not a Captain as we ordinarily understand it, because the [fol. 60] Masters of fishing boats do not have Captain's licenses and they are not required to. Pete's father owns the boat, and was not a member of the crew, and was out on the cruise at this time under the doctor's orders and strictly for the benefit of his health.

We have had a model made in order to try to make it clearer to you just what the operation was. The men put out the net,—I think they call it "set"; the net is supported on the top of the water by corks; is brought down into the water with leads so as to carry it down. The first operation in connection with pulling the net up is to pull the net together at the bottom, which is done by operating the rope from either side of the net through these rings on the winch, on the boat. There are two men working on the winch, the one forward and the one to the rear, both fore and aft. Their duty is, as the rope is pulled in on the winch, to take up the slack and coil it out of the way and where they will be free to complete the other operations.

Mr. Anelich was the winch-man toward the after or toward the rear of the boat. As they are pulling these in the corks have to be taken care of, the leads have to be pulled in, and each one of the crew has a definite, specific job in connection with that operation; and at the time this accident occurred each man was engaged in that particular job. They all worked together and each man always does the same job. After they have gotten the net together by pulling in the rings the two winch-men go over

to the side where there is a pully arrangement there and take the rings and hang them on to a hook. Just the [fol. 61] minute they are hung on the hook, of course, the pressure is taken off the winch. That rope then is entirely disconnected from the winch by the man who is the winch-tender, and then they start another operation of lifting the net. We will try to make that clear to you as we can with the model when it gets up here.

Mr. George,—I am going to call them by their first names because it is difficult for me to pronounce some of their last names,—had taken his rope off. Now, the winch-tender, as the rope came up, was supposed to attend to it and pile it behind him and leave the space right around the winch clear for the subsequent operation. Then, the winch is started again for the purpose of lifting the net. They just lift it up so as to get the fish up to the top of the water and into the boat.

In some way his rope, while he was standing by the winch, became entangled on the nigger-head on the main winch and pulled his leg into the winch. Now, the evidence will show that no member of this crew touched that rope or had anything to do with the rope during the entire operation. That was his job to take that rope off and to stay clear of it. He was the only man that touched it, and it was being done as it was always done. Our contention is that if it got caught it was just his carelessness in coiling the rope, and an unavoidable accident.

Now, we are going to try to,—largely because I think it is confusing to the layman,—show you this operation and to show you the duties of each member of the crew in connection with that operation for the purpose of showing you that he was the only one that had anything to do [fol. 62] with the rope with which he finally became entangled.

The rope was a new rope at the beginning of the season and was in good repair. We will have the testimony of the members of the crew and the owner of the vessel, and marine engineers who had surveyed the boat, that the winch and all parts of the machinery were in excellent working condition; and that the type of machinery used on this boat is the same type that is used on 75%, or more, of the fishing boats that operate upon the waters of Puget Sound. In other words, the machinery used, the form of

winch, clutch, and otherwise, is the same form of winch and clutch that is used on the great majority of the boats, and was the same winch and clutch as had been used upon this boat by these same men in performing the same operation between 135 and 150 times during the season. Nobody knows exactly how he became entangled in the rope. They were attracted first by his hollering. They immediately hollered to the engineer of the boat, who is situated at the entrance that runs down into the engine room where he operates a handle which shuts off the winch. The minute he heard the hollering he shut off the winch.

The evidence will show that he was finally released from the winch by the man who was working directly across from the winch and who was taking the rope off of the other side of the winch as it was wound up. He heard him yell, glanced over, saw his leg caught, immediately grabbed an axe which happened to be there,—they cut their wood just at the rear of the cabin, just aft of the cabin,—the axe [fol. 63] was there and he cut the rope immediately, which released him. At the time that he cut the rope the winch was at a standstill. And the evidence will show that afterwards the marks of the axe where he cut the rope, three or four strands around, there was not more than an inch or perhaps two or three inches between the blows that he had struck, the marks showing right on the metal in the winch. In other words, the winch was not moving, and the only variation there was, was the poor aim on his part in using the axe. In other words, on the first phase of this matter it will be our contention that the machinery was good, the equipment was good, the deck was wet naturally; the nets had just come out of the water and it could not be otherwise; that they were performing an ordinary duty in the ordinary way; and with the same equipment that they used all summer, and it was just an accident, no negligence, for which the owners of this boat are just as sorry as anybody else but it was nobody's fault but Mr. Anelich's.

The defenses which we have presented are the assumption of risk and contributory negligence. This action is brought under the Federal Employer's Liability Act, and under that Act a workman is held to assume,—as I think the Court will instruct you,—such risks as are incidental and ordinary to the occupation that he generally engages in, and the owner is liable only in event of negligence.

On the second phase of the matter, the evidence will disclose that this accident happened somewhere between eight and eight-thirty. There may be some confusion in time [fol. 64] there because the boat was working on Standard time and the people of Friday Harbor were working on Daylight Saving Time, or vice versa, and there might be a conflict of an hour there that may be a little confusing so I am going to ask you as the times are given to bear that in mind. There was a difference in time between the two sets of clocks.

At the time Mr. Anelich was injured the net was around the boat, which made it impossible to move the "Arizona" because the minute it was moved the net would become entangled in the propeller and they never would have gotten out. They therefore gave the distress signal ordinarily used by fishermen, three sounds of the horn, and the "Congress" and other fishing boats immediately pulled up. The "Congress" could not get directly against the "Arizona", and they therefore moved the man from the "Arizona" to the "Congress" by a small skiff, for the purpose of getting him to Friday Harbor and to a doctor at the earliest possible moment. After he had been moved to the "Congress" the "Excel II" was noticed coming up. She was called because she had a much greater speed than either the "Congress" or the "Arizona", and he was again transferred to the "Excel II".

While on the "Excel II" he was made as comfortable as possible. We have the man who took care of him all the way, and we will show that he was made comfortable on the mattress. They tried, to the limit of their knowledge as fishermen, to make him comfortable.

When the boat got to Mitchell Bay one of the men on the "Excel II" jumped off the boat onto a float and got to the [fol. 65] first 'phone that he knew existed, and immediately telephoned to the doctor at Friday Harbor that they were bringing an injured man in, and also called the United States Coast Guard and asked them to come after him for the purpose of taking him to a hospital.

The evidence will show that they took the man to Friday Harbor; that he was immediately taken to the office of Dr. Sturdevant, a registered physician, who will be here. Dr. Sturdevant gave him such treatment as he thought was advisable. We will have him here to tell you just what he did.

He did all that he could to save the man's leg. Incidentally, at the first they had put a rope, or tourniquet, on his leg above the knee. They were afraid he would bleed to death, and that was the first-aid method they knew of.

Then Mr. Mardesich, or his son, again called the Coast Guard and told them the man was badly injured, and waited a little more time. They again called without response, so Dr. Sturdevant himself called, and told them it was essential that they come get him. At that time the Coast Guard said they would reach the patrol boat by wireless, and the boat then got there as quickly as possible. In other words, the men on the boat did everything they could do to get him to a hospital.

We will show also, taking the course the boat must follow, Friday Harbor was the nearest point where a doctor could be found from the scene of the accident. At ten-thirty or ten-fifty, I have forgotten which, he arrived at the [fol. 66] Marine Hospital in Seattle.

It will be shown by the deposition which was taken there that they then put him to bed and did nothing in connection with the leg until the next morning at nine o'clock. It was on the third day that blood poisoning set in, and he gradually became worse until he died on the 8th day of August.

We will have the medical testimony here to show, and I think the doctors in the Marine Hospital admit in their deposition, that it is impossible to tell when the bacteria, or bugs, or poison, or whatever you want to call it got into his blood, and which finally resulted in blood poisoning.

We are therefore submitting the case to you on the theory that it is an unfortunate accident, no defect in the machinery causing it; and after he was injured these men did not perhaps do what a physician would have done, but they did the best they knew to make him comfortable and save his leg and save his life.

Mr. Wallace: Call Mr. Mardesich as an adverse witness, Your Honor.

[fol. 67] ANTONE MARDESICH, called as an adverse witness on behalf of the plaintiff, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Wallace:

Q. State your name, Mr. Mardesich.
A. Antone Mardesich.
Q. Where do you reside?
A. In Everett.
Q. How long have you resided here?
A. Oh, I've resided here since about 1928. I've been here before though, since 1902 to 1911, then I moved to Anacortes then; then I moved here again in 1928.
Q. What is your business or occupation?
A. Fisherman.
Q. Engaged in the purse seine fishing?
A. Yes, sir.
Q. How long have you been engaged in that business?
A. Thirty-five years.
Q. All that time in the United States?
A. Yes, sir.
Q. You are the owner of the Purse Seine Fishing Vessel "Arizona"?
A. Yes.
Q. And were such owner on August 1st, 1933?
A. I was the owner, yes.
Q. Who was the Master of that vessel on that day?
A. My oldest boy, Pete Mardesich.
[fol. 68] Q. Tell the jury the names of the members of the crew that were on that vessel that day?
A. I couldn't tell you now because I forgot. I can tell you some of them but I don't think I can tell you all of them. Maybe I can. I'll tell you all I can of them. Do you want me to tell as many as I can?
Q. Yes.
A. Jack Marincovich; Mike Swalko, is another; Pete Matiaco, is the third; George Brajcich is fourth; Lloyd Juddy is fifth; George Ruijancich is sixth, and my Pete Mardesich is seventh.
Q. And Mr. Anelich?
A. And Mr. Anelich is eighth.
Q. Now, where was George Brajcich working? What was he doing on the vessel?
A. He was working on the winch.
Q. On which side or end, the forward or after?

A. The forward.

Q. Next to the house?

A. Next to the house.

Q. And where was Mr. Anelich working?

A. On the after, on the after end of the boat.

Q. At the time the accident happened to Mr. Anelich where were you on the vessel?

A. I was there alongside the cabin.

Q. Just give us a little more in detail, because there are four sides to the cabin. Were you aft or forward?

A. Right alongside over here (indicating); in here there is kind of a hole in there alongside of the cabin and I was back here.

[fol. 69] Q. You were aft of the cabin?

A. Yes.

Q. And to which side of the vessel—to the starboard or port side?

A. It was the port side, I think.

Q. Port side is the left as you look forward on the vessel, and starboard is to the right as you look forward?

A. Yes, I think I was on the port side. You see, I can't remember just exactly where I was there now. I think I was on the port side.

Q. Now, where was Mr. Anelich working?

A. He was working on the winch.

Q. And describe where.

A. Working on that line.

Q. I asked you where Mr. Anelich was working.

A. He was working on the winch in there.

Q. Now, was it aft?

A. Aft.

Q. Toward the after end of the vessel?

A. Yes.

Q. And on which side of the vessel was he standing?

A. About in the middle of the vessel—well, sometimes he stays a little bit back here like this, and sometimes like this, I couldn't tell you just exactly, but close to the middle of the boat, that is where the winch is.

Q. Mr. Mardesich, on which side of the vessel had you cast out the net that day at this particular time?

A. On the port side.

Q. On the port side, that would be on the left side of the vessel?

[fol. 70] A. No, on the starboard side, on the right side of the vessel.

Q. The net was cast out on the starboard side?

A. On the right side, yes—oh, no, no, on the left side.

Q. I think you are right.

A. We went this way; we started to lay out west so we turned this way so it was on this side of the boat.

Q. It would be on your left side of the boat?

A. On the left side of the boat, yes.

Q. As you look forward?

A. Yes.

Q. Now, where were the other men at that time?

A. Well, every man has got his own job, some was attending to the nets and the nets was clear up in the air in that operation, and someone was standing there to clear this here to let that net down on that boat so we could start to pick up, and some was in the skiff, and some was back on the starboard, some was attending to the corks, because every man has his own job in there to attend to at the time.

Q. Now, when you first cast out, do you put out the little boat, the little skiff you call it?

A. Yes.

Q. And then what do you do?

A. We always throw that skiff behind——

Q. Yes, I know, but when you cast out your net what do you do with the little skiff?

A. He stays on the end of the net.

Q. And then what does the vessel do?

A. Goes around; he makes a circle around and comes [fol. 71] back to the little boat.

Q. And while they are doing that the net is let out?

A. Yes.

Q. How deep is that net, Mr. Mardesich? How deep does it go into the water?

A. Oh, it goes about twenty-four fathom-, that is about 130 or 140 feet.

Q. It has lead on the bottom part of it and corks on the surface part of it?

A. Yes.

Q. The corks are to keep it afloat?

A. Yes.

Q. When the circle is made describe to the jury what you do next?

A. We make a circle around the net, we come to the skiff and pull the two ends together. Then there is a long line on each side of it, on the net, we take that long line—each man got his job, one man on the bridge on the one side and the other man on the winch on the other side, and we take each line and we start the winch in operation and we put that lines around the drums so we can hoist it up, so the rings comes together, and when we take and tie those rings up we hook the hook on the block and when we tie it up then the one man holds the line so he won't slip, twists it around those ropes so he won't slip back in the water, and they take the rope off the winch, and after it's hooked up then they put that under the drum to lift it up, to hoist it up the net, and so to take it off the winch. Then the engineer is in the engine room, then we call to him to start the winch [fol. 72] again so he starts the winch and we start to hoist it up so far as we want. That's the way we do the operation.

Q. Now, as I understand, you have a line on each end of the winch; that is there is two, what we call "niggerheads", do you understand it as a "niggerhead"?

A. Yes.

Q. On each side of the winch, or forward and aft of the winch?

A. Yes.

Q. And there is a line on each niggerhead?

A. Yes.

Q. And are they coming in from the same side of the boat?

A. Yes, they are coming in from the same side of the boat.

Q. You have made your circle, and are then pulling it in, pursing it up in the bottom, making a sack out of it?

A. Yes, that's right.

Q. Now, on this occasion had you finished pursing it up when Mr. Anelich was hurt?

A. Yes, we started to lift the leads up.

Q. When you take and put this strap—is that what you call it—around the purse seine——?

A. Yes.

Q. —(continuing:) After you have pursed it up, had you hooked that strap into the hook at the time?

A. Yes.

Q. State whether or not at that time you take the lines off of the winch, your purse lines?

A. We do. Two mans in there, you know; two mans working, each man working on the winch there, and when we take and tie those rings up we hook the hook on the block [fol. 73] and when we tie it up then the one man holds the line so he won't slip, twists around those ropes so they won't slip back in the water, and they take the rope off the winch, and after it's hooked up then they put that under the drum to lift it up, to hoist it up the net, and so take it off the winch. Then we holler out to the engineer to put the clutch in and start the winch.

Q. Now, this line that you are now talking about that you lift with, is connected with the boom that is on the mast?

A. Yes.

Q. And that is only one line, isn't it?

A. That has five strands.

Q. Yes; but it is run through the block?

A. Yes, to give you power.

Q. Now, which end of the winch do you work that line on, forward or aft?

A. We work it on the forward.

Q. That is the end that George Brajcich was working on?

A. No, I was working on that line myself. I was in there and that was an experienced man that had been working there a long time, and I was taking that up myself, taking his place.

Q. George Brajcich had been working there?

A. Yes, but that wasn't his job when we lifted up the rings; that isn't his job. He goes over there and takes those lines off the blocks. He takes the lines off of the davit.

Q. That davit that you are speaking about, Mr. Mardesich, if I understand it—assuming this is the side of the [fol. 74] vessel now like this; that davit sets up like this, does it not?

A. Yes.

Q. And then on each side here is a block that a line comes through on each side and goes to these two winches?

A. Yes, sir.

Q. Now, you say you yourself put this line from the boom to lift with on to the forward end of the winch?

A. Yes, sir.

Q. And at that time where do you say the engineer was?

A. In the engine room.

Q. Where had he been working prior to that time, prior to the time you started to lift?

A. He was always when the rings comes—before the rings comes under those two blocks, oh, probably we'll say about a hundred or a hundred and fifty feet of line before she comes, he was under deck before those rings comes up; and before those rings come up, before that comes up about 150 feet of line the Captain calls him to go down in the engine room to stop the winch when those comes because there has got to be somebody there to stop that.

Q. How long is the net that you were using, or approximately how long?

A. It was about fifteen hundred feet, probably sixteen, 1550 or 1600.

Q. Is that quite a load when you start pulling in?

A. It sure is.

Q. Takes a good deal of power to pull it in?

A. It sure does.

Q. Does it take as much power to pull it in as it does to [fol. 75] lift it after you have got it in?

A. It takes just about the same, the same weight. I don't know exactly, I didn't weigh it.

Q. Would that depend somewhat upon the number of fish you had in the net?

A. Well, no, don't depend anything on the fish.

Q. When you start to lift it, it would, would it not?

A. No, the fish is swimming; they wouldn't weigh on the net.

Q. The fish are down in the water?

A. Yes.

Q. And at the time you start to lift the cork-line and the lead-line has been put aboard in the aft end, has it not?

A. Not the cork-line.

Q. Not the cork-line?

A. No; the cork-line is all around the boat in the water.

Q. It is out in the water?

A. Yes.

Q. Well, is it on just one side at that time?

A. It goes on both sides. You see, that deep net when you hoist it up it goes around the boat.

Q. Now, how is that winch driven, Mr. Mardesich? Where does your power come from to drive it?

A. From the machine, from the shaft.

Q. From the shaft?

A. Yes.

Q. What make of engine, or kind of an engine, did you have in this vessel?

A. Fairbanks-Morse Sixty, Diesel.

Q. When was that installed in the vessel?

A. 1930.

[fol. 76] Q. Was this vessel built for you?

A. No; I bought it from another fellow.

Q. When did you take it over?

A. I took it over in 1917.

Q. Did you know when it was built?

A. Yes.

Q. When?

A. 1913.

Q. By whom?

A. No, about 1914, it was, by the Barbare Brothers.

Q. Barbare Brothers in Tacoma?

A. Yes, sir.

Q. After you took it over did you make any alterations or changes in the drive-shaft or the clutches?

A. Yes.

Q. What did you do?

A. She was all remodelled in 1930. I had an accident in Everett Slough, and she was all practically new. We had it rebuilt. I had another machine before that; this is the third one I put in since I got it.

Q. This is the third engine you have had in it?

A. Yes.

Q. And you put this Diesel in in 1930, you say?

A. Yes.

Q. At that time what other changes did you make?

A. I saw the changes was made; the engine was new, different engine, and shaft and propeller.

Q. Did you put a new shaft in her at that time?

A. Yes.

Q. In 1930?

[fol. 77] A. Yes.

Q. Where was that installed?

A. That was installed in Seattle.

Q. What place?

A. In—let's see,—I don't know the name of the place. It's in West Seattle over there, but I don't know the name of the place.

Q. In West Seattle?

A. Yes.

Q. You don't know the name of the boat-builder, or engine builder?

A. No, I don't know. I know his name but I've forgot it; I can't remember it.

Q. Can you describe where it was located?

A. In West Seattle, on this side of Alki Point, on the east side of Alki Point.

Q. On the east side of Alki Point?

A. I don't know just exactly where it is,—it's in Seattle.

Q. Was it on the east or the west waterway?

A. It was on the west waterway,

Q. Now, you say at that time they put a new shaft in this boat?

A. Yes, they put some shafts, winch shafts, and what we drive the winch.

Q. Did you put a propeller shaft in?

A. No.

Q. Same propeller shaft stayed there?

A. Yes. I think I changed some sprockets, new sprockets I put in.

Q. You put in some new sprockets at that time?

[fol. 78] A. Yes.

Q. Did you install new clutches at that time to drive your sprocket chain?

A. We drive that from the engine.

Q. Yes, I know, but did you install a new clutch at that time?

A. The same clutch is on the machine.

Q. The same clutch that you had there before?

A. No; the same clutch that belongs to the machine, that Fairbanks-Morse.

Q. That propeller shaft, that remained there?

A. Yes.

Q. Now, then, the clutch that drove the winch on deck, was that the same clutch that was on there before or did you put in a new one at that time?

A. Sprockets, you mean?

Q. Yes; but you had a clutch, didn't you, to drive the winch above?

A. The big clutch drives the winch, the big clutch from the engine.

Q. That big clutch also drives your propeller shaft, does it not?

A. Yes.

Q. Now, does your drive shaft and propeller turn over when you are laying idle, or still?

A. No.

Q. When you are pulling in your nets?

A. No.

Q. All right. How do you do that?

A. It's a sprocket there,—not sprocket,—but we've got [fol. 79] some handles in here to disconnect the shaft, we disconnect the shaft from the propeller and put it in gear on the winch.

Q. Yes. Now, then, that clutch that is connected with the handle that you pull, was that changed at that time?

A. I don't remember.

Q. You don't remember that?

A. No.

Q. Where is this handle that you are speaking of?

A. What handle now?

Q. That you unclutch to start the winch?

A. It's the one down below in the engine room, and another one is on top the deck by the bit there.

Q. Right by the bit?

A. Yes.

Q. That is a part of the winch; the bit and the winch are all connected together, aren't they?

A. Yes.

Q. In other words, the winch posts form the bit above the winch, do they not?

A. Yes.

Q. And this lever is right at the corner of that winch, is it not?

A. It's at the corner on the bit.

Q. Yes. Now, do you recall which way you had to push that to get it in and which way you had to push that to get it out?

A. Yes.

Q. Tell the jury which way you pushed it to get it clutched in?

[fol. 80] A. You've got to pull it out.

Q. Yes, I know; but did you push it forward to clutch it in?

A. No, you push it backwards just like this to put it in.

Q. You push it away from the winch to clutch it in?

A. Yes.

Q. And when you want to unclutch it you push it in?

A. Yes, you push it in.

Q. Now, what made it stay in place when you would push it in away from the winch? Did you have anything to make it stay in place?

A. In place?

Q. Yes.

A. It stays itself.

Q. It stays itself?

A. Yes.

Q. Did you have any stick, or anything, to fasten it in?

A. What do you mean "stick"?

Q. Well, you know when you push the clutch in, when it would clutch in, then you wanted to start your engine, you would keep it in place, wouldn't you, until you got through pulling it in?

A. Yes.

Q. Now, how did it stay in place?

A. It stays itself.

Q. All right. Now, I did not get quite clear, Mr. Mardesich, just what Mr. Anelich was doing at the time you were fastening the line to lift the net.

A. He was there to take that rope off of the winch, that was his job in there to take the rope off of there; every [fol. 81] man is on his job. He was on his place right there in the middle of the boat there.

Q. I thought you would have a model, Mr. Mardesich; counsel spoke of one. Maybe we can use one that we have had prepared to perhaps give the jury some idea. If you will just look at this, Mr. Mardesich. (Exhibiting model to witness.) Now, just state to the jury where Mr. Anelich was working at that time.

A. He's supposed to stay right here.

Q. He is supposed to stand here?

A. Yes.

Q. And I wish you would mark on the hatch cover there an "X" where Mr. Anelich was?

A. I can't tell you.

Q. Well, approximately.

A. Somewhere between here and here. He stays in there in the handiest places he can; he's supposed to stay there in the handiest place to get out.

Q. Your net was over here, and when I say "over here" I mean to the left of the vessel?

A. Yes, sir.

Q. Or port side?

A. Yes.

Mr. Pierce: Pardon me, Mr. Wallace; there is no contention that is to scale, is there?

Mr. Wallace: Not at all; not at all, Mr. Pierce.

Q. Now, taking this line, just show the jury (assuming that this is the purse line) how it is put around the winch.

A. It's put around like this (illustrating).

[fol. 82] Q. How many turns do you take around it usually?

A. That depends; three or four; it depends how heavy it is. It depends if we've got a heavy tide we've got to put more, sometimes three and sometimes four and sometimes five. It depends on how we tie it around, and sink the cork, and everything else; sometimes it makes it heavy and we have got to put it more around; when it's easy you put it around two turns. Sometimes you fasten it five times when it's too heavy, when the tide is really bad.

The Court: As many coils as you think is necessary for the pull you have?

The Witness: Well, it's supposed to have it three to four times.

Q. In other words, you put enough coils to get sufficient friction so that the rope doesn't slip?

A. Yes.

Q. Now, in pulling in Mr. Anelich would stand over here, would he not?

A. No, he'd stand over here; this is a small boat; he stands over here, as he coils the rope over here on the side of the boat.

Q. Yes; but let's stay to this model. Where does he stand on this model?

A. He stands right here, on this side; then he coils over here,—goes just like this.

Q. As he takes the rope in he coils it up?

A. Yes.

Q. Is that coiled up on the hatch or off to the side of it?

A. Off to the side of it.

Q. Off to the side of the hatch?

[fol. 83] A. Yes.

Q. Now, when you begin to fasten your line, what line did you use?

A. This line here.

Q. And that is the line that is attached to the boom?

A. To the boom, yes.

Q. And this hook on that line is what you hooked into the rings in the lead line?

A. No, not the ring; we had a piece of another rope; there is two holes in the rope, and then you hook those two splices in this, and then you start the winch and lift it up.

Q. In other words, when you first lift your seine you then put a strap around it, or a rope, like you would tie a sack?

A. Yes.

Q. And then hook your hook in that and then lift?

A. Yes.

Q. Now, getting back to the disengaging of the clutch; does this fairly represent the lever?

A. Yes.

Q. The lever that is on that the jury can see here. This rod goes down through to the clutch below, does it not?

A. Yes, to the shaft.

Q. Now, tell the jury what you used this piece of wood for, Mr. Mardesich, that is hanging there, if there was such a one on your ship?

A. Well, I don't remember we had any there.

Q. You don't remember that?

A. No; of course, I wasn't there myself all the time. I [fol. 84] was just there for my health, so I don't know entirely what the boat holds. I didn't see that myself.

Q. You did not inspect that?

A. No, I didn't see that piece of wood.

Q. Did you inspect it this year?

A. No.

Q. You have not inspected it this year?

A. No.

Q. Do you know whether that is still on the vessel now or not?

A. No, I don't.

Q. What is it used for, Mr. Mardesich?

A. Well, let me see now; it probably is used to hold this in here in place for a safety, maybe, so she won't come off, or something like that; maybe that is what it is used for.

Q. I will ask you if that is a fair representation of your winch you have on your vessel?

A. I can't see all right with these glasses.

Q. Could I give you mine? Perhaps you could see better with these. (Exchanging glasses.)

Mr. Pierce: I think you had better look at those afterwards when you get your right glasses.

The Witness: I can't see all right with these.

Q. How often did you see the "Arizona" or have you been on her during the year 1933?

A. Oh, I was on her for quite awhile; I was on her for probably three or four weeks, something like that.

Q. Did you do any fishing at all?

A. No. I was just there for my health, and tried to do [fol. 85] what little bit I could help the boys; probably I tried to help them a little bit. Of course, I couldn't lift anything because I've got heart trouble.

Q. And when you'd go on the vessel would you look around and see what was going on?

A. I was mostly standing in the pilot house, or sitting up in the pilot house.

Q. And when she came into port here shortly after this accident you went abroad?

A. Yes, I was aboard of her.

Q. Now, Mr. Mardesich, when did you examine the clutch that is on the main drive-shaft which clutches in the sprocket wheels that drive this winch on the deck?

A. We do that inspecting, we overhaul everything every spring before we go out. We have it down on the ways and we give it a thorough overhaul so everything is in good shape and in good condition, because we can't afford to go out and to have anything break.

Q. When did you inspect that clutch prior to the time you went out just before Mr. Anelich was hurt?

A. I inspected it; the boys was working on board then; I was on there probably once a week, probably oftener, to see how everything was and to see it was all right.

Q. The work was being done under your supervision, was it?

A. No,—well, I'd tell them to put the things there, so everything was all right.

Q. Yes. Did you examine the clutch at that time?

A. Yes, I looked at the shafts down there; I went up there and looked at the shafts,—not the clutch. What do you mean, the clutch of the machine?

[fol. 86] Q. Yes. I want to show you this.

A. No; that is the coupling; that is not the clutch.

Q. This is the coupling?

A. Yes.

Q. You say that is not a cluth?

A. No, that is a coupling.

Q. What is it used for?

A. That is a coupling to couple any two things together. That is a coupling that couples any two things together; any two shafts that are put together, that is a coupling, not a clutch.

Q. This is not a clutch?

A. No.

Q. Did you have anything like this on the "Arizona"?

A. Yes.

Q. Where?

A. That is on the power haul—we have the roll with the power, that turns the roll when we pick up the net.

Q. That roll is on the back end here?

A. Yes.

Q. You have one of these that you clutch in?

A. Yes.

Q. And you unclutch it, do you, like that?

A. Yes, that's it.

Q. And then when you want it to go ahead you push it in this way?

A. Yes.

Q. Now, is there one of these on your main drive-shaft?

A. Yes.

Q. Is there one of these, or one similar, on your main [fol. 87] drive-shaft that goes back to your propeller?

A. Yes.

Q. That which runs the winch on deck?

A. Yes.

Q. Now, tell the jury what difference there is between this that I am showing you here now and the one that is on your vessel.

Mr. Pierce: I am going to object to that, may it please the Court. If this is a clutch that is used on the boat they should prove it. He says it is not a clutch that is used there. What is the use of exhibiting something to the jury that is similar; we are not interested in something that looks similar, or something that is called a coupling.

Mr. Wallace: I am just asking the witness to describe the one on his boat, and if he may use this in that description, very well.

Q. Describe to the jury the clutch that is on your vessel that drove the winch that is on the deck.

A. It is a different shape built; it's square; it's a square jaw.

Q. I see. It is not what they call a spiral clutch then?

A. That is not a clutch. We don't call that a clutch; that is a coupling.

Q. I see. Then, your clutch would have two jaws?

A. Not a clutch—a coupling.

Q. I say, your clutch on the ship that you use would be a two-jaw clutch?

A. No, the clutch is—we have got the one clutch in the boat, just the machine clutch what drives the machine.

[fol. 88] Q. Did you use this kind of a clutch, or coupling, to drive the winch?

A. A coupling, yes, similar to this but it is not this kind.

Q. And what is the difference?

A. It's square.

Q. I see. And the same clutch that is on there now was on that ship when you bought it, wasn't it?

A. When I bought it?

Q. Yes, when you bought the ship?

A. No, not the clutch.

Q. Did you put a clutch on since?

A. Yes, two of them.

Q. Where?

A. When I changed the machines.

Q. Now, when did you put on the clutch that drives the winch on the vessel?

A. I didn't put no clutch that drives the winch in.

Q. You didn't put any clutch on it?

A. No; we put the couplings on what drives the winch, not the clutch.

Q. Well, this clutch that you call a square-jaw clutch.

A. We call that a coupling, not a clutch; that is no clutch.

Q. That is no clutch?

A. No.

Q. Well, it couples and uncouples, doesn't it, as you want to use it to drive or not drive?

A. Yes, that is a coupling.

Q. You don't call that a clutch?

A. No; it's not called by anybody a clutch; it's called a coupling.

[fol. 89] Q. You think a clutch, then, is a piece of machinery that is put together and stays there permanently, is that right?

A. A clutch is what you use for the machine. The machine's got a clutch that can back up and go forward.

Q. All right. What do you use to stop or start this winch?

A. That coupling.

Q. Now, describe that to the jury.

A. We got down below in the engine room a handle there to pull like this, and we couple the propeller, you shove it into the shaft to drive the winch; it couples on another side.

Q. When was that coupling put on the "Arizona"?

A. That was put on, well, probably four or five years ago; maybe three years ago; I don't remember when I put that on, because I changed three or four of them.

Q. And when did you last change them?

A. Well, I don't remember now to tell you the truth, because I've got too many things on the boat to change around so I don't remember when I changed these things.

Q. Did you change it in '33?

A. No, I didn't.

Q. Did you change it in '32?

A. I don't remember.

Q. Did you make any change in that coupling or clutch, as you call it?

A. No, I don't change anything. This is the same thing that I had for the last twenty-five years—the same thing I've had since I've been running the boat; I've got three different boats, and I've been running the same kind of operation all the time.

[fol. 90] Q. Now, Mr. Mardesich, your chain sprocket wheel, that is connected with the main drive shaft and then comes up to a counter shaft?

A. Yes.

Q. And it is there connected again on a sprocket, is it not?

A. Yes.

Q. And then there is another sprocket wheel on the after end of that counter shaft, is there not; that is, just below this sprocket wheel in here that is shown? That is, you can see that this is a round piece of wood that we have here, can't you? What is there on yours?

A. That is a sprocket.

Q. That is a sprocket with a chain drive?

A. Yes.

Q. That goes to the sprocket wheel on the counter shaft just under it?

A. Yes.

Q. And then forward on the end of that counter shaft is another sprocket wheel?

A. Yes.

A. And that goes down to a sprocket wheel that idles on the main drive shaft?

A. Yes.

Q. And is clutched in to this square jaw clutch, or coupling, as you call it; that goes in square and not spiral as the one you looked at here?

A. Yes.

Q. That is the only difference between the two, is it not?

A. Yes.

Q. Now, tell the jury when you inspected that coupling, as [fol. 91] you call it?

A. I inspected it all the time, every spring whenever we go out.

Q. And what condition was it in?

A. It was in very good condition, first class shape.

Q. Did it ever slip out when you had a load on it?

A. No.

Q. Never did?

A. Not that I know of.

Q. Then, again, I would like to ask you why it became necessary for you to provide on your vessel a fork, or stick, to hold the lever over and to hold that clutch in gear, Mr. Mardesich?

A. Well, maybe they put that there so she wouldn't slip, or something like that: but I don't know.

Q. You tell the jury now you never saw that stick on your vessel?

A. No, I don't think so; not that I remember. Maybe I did, but I don't remember of it.

Q. Did you ever investigate that winch to see how it was held in?

A. You don't have to investigate it; there is all kinds of stuff on the boats, they have got the ropes, and things, and they put the things on when they are loading up the boat and I didn't investigate any particular part. I just investigate the main part of it, chains and sprockets and clutches, and we got the clutch out that year and rebuilt that clutch, and we fixed it up in first class condition to go out. We can't afford to go out otherwise unless it's in first class condition.

[fol. 92] Q. Have you seen that vessel operating with that piece of wood in here?

A. Well, not that I remember of.

Q. You don't remember that?

A. No.

Q. Don't you know, as a matter of fact, Mr. Mardesich, that your clutch was so worn that it would not stay in gear without being keyed in?

A. No. Now, that is not true.

Q. That is not true?

A. No; everything was in first class condition.

Mr. Wallace: You may inquire.

Mr. Pierce: No questions at this time, may it please the Court, and reserve the right to recall him later.

(Witness excused.)

[fol. 93] Mrs. Antonia Anelich, the plaintiff, called as a witness in her own behalf, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Wallace:

Q. State your name, Mrs. Anelich.
A. Antonia Anelich.
Q. Where do you reside?
A. In Everett.
Q. You are the widow of Mario Anelich?
A. Yes.
Q. How long had you and Mario Anelich been married?
A. Twenty-one year.
Q. And where were you married?
A. In the old country.
Q. How many children have you, Mrs. Anelich?
A. Three.
Q. And what are their names?
A. Romelda, and Marie, and Tony.
Q. And what is the age of Tony?
A. He is twelve years old.
Q. And what is the age of Marie?
A. Thirteen.
Q. And what is the age of Romelda?
A. Twenty.
Q. Now? You are speaking of the present time?
A. Yes.
Q. They would be a year younger at the time their father [fol. 94] was injured?
A. Yes.
Q. Where did these children live, Mr. Anelich? Where did they reside?
A. What you mean?
Q. Did they live with you?
A. Oh, yes.
Q. And did your husband live with you?
A. Yes.
Q. Tell the jury what his occupation, or business, was? What did he do for a living?
A. Oh, he was fishing and working besides in the winter time.
Q. Where did he fish?
A. He fish in Alaska, and over here at what they call Puget Sound, you know.
Q. And did he sometimes fish for himself?

A. Yes.
Q. And was he employed besides sometimes?
A. Yes, sir.
Q. Who was he employed by in 1933?
A. Mr. Mardesich, Tony Mardesich.
Q. Do you know what vessel he was on?
A. Yes, the "Arizona".
Q. State to the jury whether or not he was a good worker, an industrious man?
A. Oh, he was good, because he was working in the summer and in the winter, and that's all he was doing was working hard for the family all the time.
Q. How much did he make per month, or the season, when he was working for himself and fishing?
[fol. 95] A. Oh, he used to make, probably about,——

Mr. Pierce (interposing): Objected to as incompetent, irrelevant and immaterial. I understand he had sold his boat sometime prior.

Mr. Wallace: Well, when he worked for himself I wanted to show what he made. This is for the purpose of proving his earning power.

The Court: It will be overruled.

Q. What did he make, Mrs. Anelich, when he worked for himself in fishing?
A. He used to make in Alaska every year about thirteen, fourteen hundred dollars in five months.
Q. And how much was he making in 1933 when he got hurt?
A. Four hundred dollars they send me a check after he was dead.
Q. How much would that be per month?
A. Oh, I don't know how many months.
Q. How much would you say his average earning was for the last five or six or seven years?
A. About 1920?
Q. No, I mean per month. How much would he take in as an average?
A. Oh, about to figure everything, you know, it would run one hundred and fifty, two hundred dollars a month.
Q. And what did he do with his money?
A. He supported the family.
Q. Well, I know; but did he bring it home, or what did he do with it?

A. Yes, he used to bring it home and give it to me every penny what he used to make.

[fol. 96] Q. And what did you do with it?

A. I used to keep it; we needed it; and I'd save it, and use it to buy things what we needed, that's all.

Q. Now, what kind of a father was he? Was he good to the children?

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial.

A. You can't find a better father.

The Court: It will be overruled.

Mr. Pierce: May it please the Court, I want to be heard on that, because the measure of damages in this type of case and under this Act, as I understand the law, and under the Federal rule as adopted by this state is limited to pecuniary loss.

The Court: It is. Perhaps this word "good" is not the most appropriate one.

Mr. Pierce: My position now is that this element of companionship, which I think counsel is trying to establish, is not a proper element.

The Court: It is not. It is pecuniary loss alone that we are concerned with.

Mr. Pierce: I could not see the pertinency of this particular question to pecuniary loss, and that is the ground upon which I objected to it.

The Court: I say, perhaps this word "good" is not the most appropriate one.

Mr. Wallace: Yes, I think the Court is right about that.

Q. Tell the jury, Mrs. Anelich, what the habits and conduct of your husband was towards yourself and the chil-

[fol. 97] dren during the time you lived with him and the time you have had children and lived with him?

A. I don't understand what you mean.

Q. How did Mr. Anelich act? What was his conduct towards the children? How did he treat the children, kind?

A. Oh, boy, that is hard to explain it in my family.

Q. Well, go ahead and tell the jury.

A. My husband, every penny he made he used to bring it home and he'd treat the children nice, and play at home;

he never went to pool rooms, he never went no place; it usually was called home, sweet home with the family; that's all I can say.

Q. Did you see him shortly after this accident?

A. I seen him after they bring him in Seattle. He was three weeks away from home before he got hurt. I seen him in Seattle that same night he come home.

Q. Where did you see him at Seattle?

A. In the Marine Hospital. It was ten to eleven I seen him in the night.

Q. Tell the jury, Mrs. Anelich, whether or not he was suffering at that time?

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial.

A. He was sure suffering.

Mr. Pierce: Just a minute, Mrs. Anelich. This is objected to as incompetent, irrelevant and immaterial under the Lindgren case, the last case of the expression of the Supreme Court, in which under recovery under the Jones Act pains and suffering during lifetime is not an element of damage.

[fol. 98] The Court: It is not an element of damage in this case as pleaded.

Mr. Wallace: I think, Your Honor, it is. We have pleaded pain and suffering.

The Court: I know you have pleaded pain and suffering, but this action is essentially one for the loss of life due to alleged and wrongful acts. This cause of action is that of his personal representative.

Mr. Wallace: Many cases, I think, Your Honor, hold that pain and suffering is a part of the cause of action which accrues to the widow and children under this act and that they may recover for that pain and suffering, and that it is not a cause of action given to the deceased.

The Court: Well, I will have to be shown those cases.

Mr. Wallace: Yes. I appreciate that there are going to be perhaps some legal questions here, and it is hardly necessary, it seems to me, that we thrash out each one as we come to it. We might do that at sometime when we could present our authorities to the Court, or we can take it now, just as the Court desires. I think that under this Act the pain and suffering is part of the cause of action

of the mother and children, and it is not a part of the cause of action of the deceased. The deceased may have had a cause of action but when he died he lost that so far as this Act is concerned, particularly is that so with reference to the Jones Act, which is not exactly like the Federal Employers' Liability Act.

The Court: You may present your authority at half past one o'clock this afternoon.

[fol. 99] Mr. Wallace: All right, Your Honor.

Q. Mrs. Anelich, did you see Mr. Mardesich shortly after this accident?

A. That was Wednesday, and I seen him in the street, and he don't want to talk to me; he don't want to meet me.

Mr. Pierce: Objected to as not responsive to any question.

The Court: The answer is stricken. She may answer the question by "yes" or "no".

Q. Did you see Mr. Mardesich shortly after the accident?

A. I see him and I talk——

Q. (Interposing.) Never mind about that. I will ask you separate questions.

A. I seen him in the street lots of times.

Q. Did you have a talk with him?

A. Never, never.

Q. Did he not come to your house?

A. Never, never.

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial, and having no probative value in this case, and tending to prove no issue.

The Court: It will be sustained.

Q. I don't think you understand me, Mrs. Anelich. After Mr. Anelich was hurt, did you see and talk to Mr. Mardesich, the defendant?

A. Yes; three days after my husband was hurt Mr. Mardesich he come to my place with his wife, Mrs. Mardesich, and I come from Seattle,——

Mr. Pierce (interposing): Just a minute. The question has been answered.

[fol. 100] The Court: You have answered the question.

Mr. Pierce: If I might, I should like to have the witness instructed to confine any conversation that she relates

to facts of this accident; otherwise we are going to get immaterial matter into the record. If there are any facts concerning this accident that was discussed I will admit its competency, but unless they are facts connected with this accident I am objecting to them.

The Court: Well, I don't know that I can indicate further than I have to the witness that she should answer the question and then cease to talk.

Q. Mrs. Anelich, when Mr. and Mrs. Mardesich come to your house a few days after the accident, did Mr. Mardesich talk to you about how the accident happened?

A. Yes; he explained to me.

Q. Now, tell the jury what he said to you as to how it happened.

A. You know, I come home from Seattle to see my children,——

Q. (Interposing.) Well, now, you are trying to tell us something else entirely. Just get right to the point.

A. Mr. Mardesich he come there after I come home, he come there with the wife, Mrs. Mardesich, and he sit down in the chair, and he asked me how is my husband and I told him, I says, "My husband is in a bad condition". That was Wednesday, the third day after he was hurt; he was ready to die that day.

Mr. Pierce: Just a minute. The question asks whether he discussed it.

The Court: Just a minute. Just read the question to [fol. 101] the lady.

Mr. Pierce: She is not talking about facts.

Mr. Wallace: She is not, I know, Mr. Pierce. I am just as anxious to see she does as you are.

The Court: Read the question.

(Question read: "Now, tell the jury what he said to you as to how it happened?")

Q. Now, Mrs. Anelich, you didn't answer that question but I will ask you another. What did Mr. Mardesich say to you as to how the accident happened?

A. I asked him, I said, "Mr. Mardesich, how the accident happened?" He said to me, "Mrs. Anelich", he say, "I am sorry; when all the crew was on the deck and I was in the pilot house and your husband and another man they was on the winch and they was pulling the net, or cork,

or net, or whatever it was, I don't know what," and he said to me, he said, "I don't know what was wrong in my boat, but at the time he got caught, your husband, if your husband wasn't there it would have caught my son" and he scratch his head like that, (illustrating). I was crying, and I can't ask no more questions, and that is all.

Q. Now, as I understand you, he said all the crew were on deck?

A. Yes, that minute he say it was happening; the engineer was on deck and he jump down and stopped the machine, and Mr. Mardesich he can't stand to see me.

Q. Did he tell you then what they did for Mr. Anelich?

A. No, I no ask him. They told me they done the best they can. I don't know what they done because I don't see [fol. 102] nothing. They no said nothing to me no more.

Q. How old are you, Mrs. Anelich?

A. I am forty-two.

Q. Then you would be forty-one at the time of this accident, or approximately that?

A. Yes.

Q. How old was Mr. Anelich?

A. Forty-five.

Q. At the time he was injured?

A. He was forty-four.

Q. Forty-four at the time he was injured. Did you see Mr. Anelich's leg at the hospital?

A. Oh, I seen it just in the bandage, that's all I seen. I seen the blood; I see everything; I see the knee plain.

Q. Did Mr. Anelich tell you what part of the vessel had hurt him?

A. He say the winch.

Q. Caught in the winch?

A. Yes, that's all.

Q. What did he say about that? Tell us.

A. Oh, I don't know.

A. Didn't he tell you,——

Mr. Pierce (interposing): Just a minute.

Mr. Wallace: I am not going to do it Pierce. I am tempted to lead her, Your Honor, to get facts, but I won't; we will have to get them some other way.

The Court: Members of the Jury, this being a civil case you are permitted to separate and each one of you go your own way during the recesses of the court until you shall

retire to consider of your verdict. During these times of [fol. 103] your separation you will not talk with anybody about this case anywhere, at any time, but must get your information concerning this case from those ones who sit here before you and testify under oath. You will not express any opinion to any person, even to one another, as to the merits of anything concerning this case until you have heard it all and have retired to the jury room to consider of your verdict. Subject to these instructions you are excused until half past one o'clock this afternoon. You may now go to the jury room. At half past one o'clock you will report to the jury room.

(Adjournment taken at 12:00 o'clock noon until 1:30 P. M.)

1:30 o'clock P. M.

The Court convened pursuant to adjournment; all parties present as heretofore; jury absent from jury box.

(Argument by respective counsel.)

STATEMENT OF COURT

The Court: On this question of whether or not there can be proof of a recovery of damages for any pain and suffering of the deceased counsel for plaintiff cites the case of St. Louis etc. Co. vs. Kraft, 237 U. S. 1161, and it would seem clear that such recovery may be had as against a railway company under the Federal Employers' Liability Act and its amendments. It seems there to be clearly declared that the personal representative as a trustee or agent for the beneficiaries, rather than for the benefit of the estate of the deceased, may have that recovery. The reason, it seems to me to be, that not alone is it provided by the Federal statute that the deceased's cause of action for pain [fol. 104] and suffering or loss sustained by him while he lived, is made to survive as distinguished from abating as it would have done in the absence of statute, but it is also made the right of the personal representative to recover upon this surviving cause of action as well as upon the new cause of action given rise to in favor of that personal representative as a trustee, all for the benefit of the next

of kin, or those ones designated in the statute. This was worked as a result of the amendment of 1910.

Now, it is urged on behalf of defendants that the provisions of the so-called Jones Act, making the provisions of the Federal statute known as the Employers' Liability Act applicable to seamen, are not broad enough to include within the right of recovery by the personal representative as a trustee for those ones enumerated in the statute, any damages for pain and suffering or loss suffered by the deceased in his lifetime, but are broad enough only to include and make applicable to seamen that new right of action availed of by the statutory provisions that for injuries causing death and deprivation of pecuniary aid, for those for whose benefit the right of action is made to exist. The section of the statute appears as Sec. 688, Title 46, in U. S. Code Annotated, and so far as we are concerned with it reads as follows:

"And in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury";

that is the conference upon the personal representative not for the benefit of the estate but for the benefit of those [fol. 105] named in the statute of a new statutory cause of action. The statute then proceeds: "And in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable".

This section was adopted or became the law March 4, 1915, subsequent to the amendment of the Federal Employers' Liability Act and I take it subsequent to the decision in the case of St. Louis & Iron Mountain etc. Co. vs. Kraft, and I think it must be held that the words are broad enough to make available to the personal representative of the deceased seaman the right to prove damages for pain and suffering in the lifetime of the deceased. I think the words "right of action for death" are not to be confined to that new cause of action which the Federal Employers' Liability Act gave rise to but must be construed as including all the benefits that the Federal Employers' Liability Act conferred at the time of the enactment of this Sec. 688. I was of opinion this morning when this

point first arose that there could not be in this action maintained by a trustee such a recovery; that recovery for pain and suffering was the right of the deceased, and while that cause of action would survive death yet recovery upon it must be for the benefit of the estate of the deceased rather than for the benefit of the beneficiaries under the section and statutes giving rise to the new cause of action.

You may bring the jury.

(Jury return to jury box.)

[fol. 106] Mrs. Antonia Anelich, resumes the witness stand on behalf of plaintiff, and testifies further as follows:

Direct examination (continued).

By Mr. Wallace:

Q. Mrs. Anelich, when you saw your husband at the hospital was he suffering pain?

A. Yes.

Mr. Pierce: May the record show my objection?

The Court: It may so show.

A. Yes, he suffered pain.

Q. Did he say anything to you at that time about what pain he had suffered?

Mr. Pierce: Now, I object to any comment he may have made, as being self-serving; she has the right to testify to anything she observed, but nothing he may have said.

The Court: She cannot testify to what he said but she may testify as to whether he made expressions indicating he was suffering—whether he complained.

Mr. Wallace: If the Court please, I think that the witness has a right to say what her husband said to her about whether he had suffered pain or not by reason of these injuries.

The Court: I have said she may testify, if it is a fact, that he complained of pain.

Q. Did he complain of pain, Mrs. Anelich?

A. Yes; he said the me,——

The Court (interposing): Now, that is all. What he said [fol. 107] is not for you to testify to.

Q. What did he complain of?

A. He complained, you know, of sore feeling of the back.

Q. This forenoon you testified with regard to Mr. Anelich's attitude toward the children. Just tell the jury what care and attention he gave to the three children during his lifetime, in a general way?

A. Oh, he done everything; he buyed clothes and sent them to school, and give everything for the school, and treat them the best he can. I never seen him treat the children bad nor lick them, nor nothing. He tried to talk plain and nice and everything was nice; nothing was bad.

Q. What was his attitude concerning the home, and what did he do around the house, if anything?

A. Oh, he do everything—bring some wood in and make a garden, and he do everything what a man is supposed to do around the house.

Q. Well, that is too general, Mrs. Anelich. Did he keep up the house? I don't want to coach you on it, or suggest to you, but just tell the jury how he conducted himself around the house.

A. Well, he was helping me to bring some wood in, and everything else.

Q. State whether or not he was continuously employed?

A. Yes.

Q. I think you have stated as to the amount of his earnings, and that he brought it home to you?

A. Yes.

Q. This forenoon you started to describe a conversation between yourself and Mr. Mardesich shortly after the acci-
[fol. 108] dent and while your husband was in the hospital. I wish you would tell the jury what, if anything, Mr. Mardesich told you as to how Mr. Anelich's leg was injured; by what it was injured, if he described that to you.

A. Sure.

Q. Just tell the jury.

A. Mr. Mardesich, I asked him how it happened the accident; Mr. Mardesich he said to me, he said, "There was something wrong in the boat, and the rope",—you know, my husband he kind of figure him jump, you know, and he fall down with his legs up and his hands down, you know, on the floor, and the rope caught him in the legs, and you know the winch is always going and the pulley pulls the winch and the rope break his leg, and my husband he started hollering and one man was there and another man, and each

one of them take an axe and cut, and untied the rope, and the winch was always going around just the same.

Q. Did he tell you how they got Mr. Anelich out of the winch and free from the rope?

A. Yes, they cut it the rope.

Q. Did he say whether or not the winch had been stopped at that time?

A. The engineer went down and stop it; that's what he told me.

Mr. Wallace: You may inquire.

Cross-examination.

By Mr. Pierce:

Q. Who was present at the time you were having this conversation which you relate? Who was present? Who [fol. 109] was there wh[illegible] had this conversation with Mr. Mardesich?

A. Mr. Mardesich, with the wife, Mrs. Mardesich, and me and my daughter, we was talking at my house everything about it.

Q. And when did this conversation take place?

A. What do you mean?

Q. When was it?

A. That was Monday it happened, the accident, and that was on a Wednesday at the night, six o'clock, I come home from Seattle.

Q. And who were you talking to at the time?

A. Mr. Mardesich and Mrs. Mardesich.

Q. Mr. Tony or Mr. Pete Mardesich?

A. Mr. Tony Mardesich.

Q. Your husband had followed the fishing business for a good many years?

A. Yes.

Q. And during the summer time he worked when the fish was running; that was his business?

A. Yes.

Q. And what did he do in the fall of the year?

A. He was always looking out for a job.

Q. Well, what did he work at?

A. Anything, labor.

Q. What was the last job he had in the fall of the year and after the fishing season was over?

A. One year after we move in Everett he was working in the dredge over here.

Q. Working all the time?

A. He was working three months steady all the time.

[fol. 110] Q. What year was that?

A. 1931, something like that; they filled up that place, I don't know what they call that.

Q. Did he work in the fall of '32, and if so, where?

A. He was working in the cannery.

Q. What cannery?

A. The Fishermen's Corporation down here.

Q. How much did he work?

A. He was working pretty good that year, 1932 that was.

Q. How much of the time did he work, one month or two months?

A. I don't know so many months, four or five months, you know, maybe.

Q. Did he work all the time?

A. Not every day.

Q. He was laid off quite a little of the time?

A. He was working sometime maybe two or three days a week, and so many nights, because that winter it was awful cold and they used to call him.

Q. Well, his employment, Mrs. Anelich, during the winter months was not steady, was it?

A. Oh, I can't say that; I forget that; I don't know.

Q. You don't know about that?

A. No. I know he was working pretty good.

Q. And you testified as to his average earnings. What was his average earnings during the winter months when he was not fishing?

A. Sometime he was working he make five, six dollar a day anyway.

Q. But his monthly earnings?

[fol. 111] A. I can't tell you that.

Q. You can't tell?

A. No.

Q. Now, the fishing season, Mrs. Anelich, lasts how long?

A. Five months.

Q. Now, the earnings from the fish vary quite a lot, don't they? There are some good years, and some bad years?

A. Yes.

Q. Some very bad years?

A. Some years it was good, too.

Q. Some bad years, too?

A. That's all right; there was some good and some bad years.

Mr. Pierce: That is all.

Redirect examination.

By Mr. Wallace:

Q. Mrs. Anelich, where did he work in the mills, did he work here?

A. No,—over here in Everett he worked.

Q. For some lumber company?

A. He used to work steady four or five months in the winter time.

Q. In regard to his employment in the winter time you stated to counsel you didn't know. Now, it seems to me you ought to know if he was at home all the time or what part of the time, or portion of the time he was employed in work outside of the fishing season. Take the year 1932, Mrs. Anelich, after the fishing season was over, where did Mr. Anelich work, or what did he do?

A. He was working at home, you know, and in the dredg-
[fol. 112] ing that winter.

Q. In the dredging?

A. Yes, in the dredging.

Q. How much did he make a day while he worked there?

A. He was working, you know, every day, Sunday and everything, making three dollars a day.

Q. And in 1931 when he was not fishing, where did he work, and what did he do?

A. In 1931 he was working in the dredging; in the summer fishing.

Q. Yes; but outside of the fishing season where did he work?

A. I couldn't tell.

Q. Did he work outside of the fishing season?

A. Yes, in the winter.

Q. Do you recall where he worked in '31? That is three years ago. After he finished fishing where did he work? Do you remember where he worked?

A. Yes.

Q. Well, tell us where he worked.

A. He worked down at the Everett Port.

Q. At the Everett Port?
A. He worked for the City at the Everett Port.
Q. What did he get a day?
A. Three dollars a day.
Q. Now, when he was fishing in Alaska state whether or not he sent his checks to you?
A. Yes.
Q. And how much were they, Mrs. Anelich?
A. Sometimes it was a check about five, six, seven, you [fol. 113] know, they would draw so much.
Q. Seven what?
A. Seven hundred.
Q. Five, six, seven hundred dollars?
A. Yes.
Q. That was sent down to you?
A. Yes.
Q. Now, how often did those checks come down while he was up there fishing?
A. What you mean?
Q. How often did you get money from him when he was fishing in Alaska?

Mr. Pierce: What year, Mr. Wallace?

A. (No response.)
Q. Do you understand my question, Mrs. Anelich?
A. No.
Q. Well, how many checks did he send down to you in a year?
A. In a year; oh, he used to send me, you know, one check; the rest of it he used to bring it.
Q. He used to bring the rest at the end of the season?
A. Yes.
Q. And how much would he bring down at the end of the season?
A. It used to be around thirteen, fourteen hundred.
Q. Would that be in addition to what he sent you?
A. Yes; yes, altogether.
Q. And did he give you that money?
A. Sure!
Q. How many years did he fish in Alaska, Mrs. Anelich?
[fol. 114] A. He fish in Alaska I guess around five year.

Mr. Wallace: That is all.

Recross examination.

By Mr. Pierce:

Q. That is, when he had his own boat?
A. And before.
Q. And then he lost his boat?
A. Yes.
Q. And then he went to work for other men fishing?
A. Yes.
Q. And you say that he made altogether about twelve, thirteen, fourteen hundred dollars a year?
A. Before, yes.

Mr. Pierce: That is all.

Redirect examination.

By Mr. Wallace:

Q. That is, you mean he made that fishing?
A. Yes.
Q. In addition to what he made otherwise?

Mr. Pierce: Let her testify, Mr. Wallace.

Mr. Wallace: I didn't like your question, Mr. Pierce; you are not limiting it to the fishing. That is all, Mrs. Anelich.

(Witness excused.)

[fol. 115] Mr. Wallace: Mr. Mardesich, if you have your reading glasses, I would like to continue my questioning.

Mr. Antone Mardesich, resumed the stand for further examination on behalf of plaintiff and testified as follows:

Direct examination.

By Mr. Wallace:

Q. I will show you a picture and ask you, Mr. Mardesich, if that is a fair representation of the winch of the "Arizona"?

Mr. Pierce: I object unless it is fixed as of the date of August 1st, 1933, the time this accident occurred; otherwise, that has no probative value at all in this case.

The Court: That is true.

Mr. Wallace: We will show before we finish our evidence that it is the same as it was on that day.

Mr. Pierce: The orderly procedure then is to prove it. Clearly that picture was not taken on that day of the "Arizona".

Mr. Wallace: Oh, no, it was not. I think the objection is coming too early. I should have time to identify the thing if I can.

The Court: Well, with the undertaking of counsel for plaintiff to supply the proof that has been mentioned, that is to say that this photograph is of that winch as it existed [fol. 116] at the time of this injury, you may proceed.

Q. Do you identify it, Mr. Mardesich, as being practically the same condition as existed on August 1st, 1933?

Mr. Pierce: I certainly object to the question "practically".

A. I can't make it out.

Mr. Pierce: I am going to object, may it please the Court, the picture shows a piece of board there resting against a handle, and obviously with the winch running that condition could not have existed. I do not know when the picture was taken and I think counsel should take the orderly procedure and prove the picture. I don't know when it was taken. It may have been taken this year, and it may have been taken last year.

Mr. Wallace: It was taken September 22nd, 1933.

Mr. Pierce: Then I have a right to know by whom it was taken, and who put that board in that position. No member of this crew ever put it in that condition.

Mr. Wallace: Oh, yes, they did.

The Court: Well, I have ruled upon that matter. Counsel is undertaking to supply the proof. The examination may proceed.

Mr. Wallace: I want to say this, Your Honor, when I say "practically", what I mean by that is that there may be a rope hanging here in the picture and that may have been moved over there at the time we took the picture. I'm talking about the physical structure being the same. That [fol. 117] is the meaning I wish to convey. I think I am within my rights to show that.

Q. Do you recognize it, Mr. Mardesich, as being the picture of the winch?

A. I recognize this drum; I can recognize the drum.

Q. Shortly after you came in at the end of the 1933 season, state whether or not you did some repair work upon your vessel?

A. No.

Q. What pieces of machinery or equipment, if any, did you remove from it shortly after you came in from that fishing season?

A. None.

Q. Did you not take off of that vessel the fly-wheel from the engine and take it into the shop down here at the dock?

A. I don't know now, I couldn't remember that; I think probably we did.

Q. And weren't you present there when I came aboard the vessel when you showed me where Mr. Anelich was standing?

A. Yes.

Q. And that you were then taking the fly-wheel in to have something done to it?

A. Oh, yes; that wrapping on the keel came loose like it does on any fly-wheel; any fly-wheel once in awhile gets loose and you have to fix it up.

Q. Exactly.

A. It was nothing wrong with it.

Q. I'm not complaining, I'm just asking you what the facts are. Now, at that time you took some shims, did you [fol. 118] not, out of the bearings?

A. No, sir.

Q. Will you notice on top of this post? Just look on top of this post and state whether or not that is one of the shims?

A. No, I didn't put that there and I never seen that there myself.

Q. Now, tell the jury, Mr. Mardesich, just where Mr. Anelich was standing, and just where Mr. Anelich's leg was caught. You were there?

A. I didn't see how it was caught.

Q. Did you not look at it after the injury?

A. After the injury?

Q. Yes; and before they released him.

A. No, I wasn't there because I was sick and I went in the pilot house and the boys done the work there.

Q. Well, didn't you see him while his leg was fastened in the line?

A. Well, yes—well, no, I didn't see it when the leg was fastened in the line but I seen it—I was here myself on this side of it and I was holding this line up. I was holding this one here to make the operation here; this was on the winch in here, and then when he yelled then is when we all yelled to stop the machine and the engineer immediately stopped the machine and when he stopped the machine I put that right on this, like this, so I can hold it so this one can come down; that is about a ton or a ton and a half of weight on this here, and won't let this down. This side was released off of here and when he got the foot caught I don't know how his foot got caught in here; I hold this [fol. 119] weight right on this like that so it won't come down and fall down, it would hit somebody because the boys was right under here, because that is their job. If I let go of this when he stopped the winch then that weight pulls back the winch, that power.

Q. It would back it off?

A. Sure.

Q. Now, at that time his leg was between the niggerhead and the line, wrapped around the niggerhead?

A. It was on the niggerhead, yes.

Q. And caught with the line?

A. Caught with the line, yes, sir.

Q. Your counsel stated to the jury that there were four turns around that line.

A. Just about four turns.

Q. That is what you told your counsel, didn't you, Mr. Mardesich?

A. No, I didn't told him that.

Q. You didn't tell him that; but you did take an axe or somebody did, and cut it off to release it?

A. Yes.

Q. And the line that you are now holding which is the line from the fall, you had taken some turns on the forward end of the winch?

A. After this operation is supposed to be all done this line is supposed to be done and this fellow on this side he

took it out; he's supposed to take all that out, and when he takes it out this line then I pull on this here to hold this, this weight here, and this fellow is supposed to take it in the same time himself. He takes this line off of the block [fol. 120] and pulls it out here and this other fellow pulls it out clear over to the bit, and this fellow is supposed to be taking it out here, and then we started the winch in operation to raise this.

Q. Now, Mr. Mardesich, just before Mr. Anelich got caught in the winch, had you taken the load off the same, this three tons or such a matter as you speak of, had you taken that weight on to the fall that is attached to the boom?

A. Yes, just before he got hurt.

Q. You had taken the weight on that off the same?

A. Yes.

Q. And that, would it not, take the weight off of the purse lines?

A. Oh, yes, it takes the weight entirely off of the purse lines.

Q. Now, what did you do for Mr. Anelich after you got him out of the winch there?

A. We called the "Congress" boat which was in there first, and we called the "Congress" right away, it was the closest to us, to come over here and to get him to the doctor right now. So the two boys got him in their arms and one of them took his boots off, and we called for that boat to come in and get Mr. Anelich to the doctor right away, so she came and the boys took him in their arms and put him in the skiff. They had to put him in the skiff, you know, because they couldn't come alongside of our boat because we was surrounded with a net, so we had to get the little skiff, and these boys took him in the little skiff and they [fol. 121] never let him out of their arms; they kept him in their arms all the time, and they transferred him to the "Congress" and the "Congress" started away, but I see the boat "Excel II" there—the "Congress" can run forty horse power and this "Excel II" had one hundred and fifty horse power, so I holler at the "Congress" to transfer him on the "Excel II" and take him to the Friday Harbor just as quick as possible because the "Excel II" is a faster boat to get him to the doctor.

Q. Why did you want to get him there quickly?

A. Because we know that he got some broken bones in there and we couldn't fix it up for him and we wanted to get him to the doctor right now; we aren't doctors; we are fishermen; we couldn't fix anything, you know. And if he is hurt, or anything like that, we can put some iodine on it but when it's broken bones, or anything like that, we can't fix that up.

Q. Did he appear to be suffering there?

A. He wasn't suffering very much. Of course, I don't know how much he was suffering. Of course, when it's a broken leg I guess he suffers some.

Q. Did you put a tourniquet on his leg to stop the blood?

A. Another fellow did.

Q. Who did that?

A. George Brajcich.

Q. And George is one of your employees, and was working on the opposite side of the winch?

A. Yes, sir.

Q. And Mr. Anelich was working as an employee there on the vessel as a seaman?

[fol. 122] A. Yes.

Q. Now, Mr. Mardesich, did you have any iodine there of any kind?

A. Oh, yes.

Q. Did you put some on it?

A. No, we didn't.

Q. Did you bandage it up?

A. No, we just put that rope on it so he wouldn't bleed because he was bleeding so, and they seen more than I did because I was sick and excited, and I had to go to the pilot house and get me some digitalis for my heart and I laid there for awhile until I got through with it.

Q. How far is the crossing to Victoria from where you were fishing and where Mr. Anelich was hurt?

A. Well, I'll tell you, it's about approximately twenty miles.

Q. About twenty miles?

A. Yes, sir.

Q. How far is it to Friday Harbor?

A. Oh, let's see, it's approximately about fifteen miles.

Q. Now, did you send anyone with Mr. Anelich from your boat?

A. No, I didn't, because I was kind of upset, and there was a man in the "Congress", and it wasn't necessary there to send anybody because there was lots of men on that boat the same as mine, so he knows just about as much as another man to do anything for him.

Q. Now, where did you go after you took your net in the "Arizona"?

A. We went right straight to Friday Harbor.

[fol. 123] Q. You spoke of putting a man ashore, I believe, or your counsel said somebody was put ashore from your boat?

A. No.

Q. Did you not put a man ashore up there somewhere?

A. No, not from my boat.

Q. Then you did not go ashore, or call anybody on the 'phone until you got into Friday Harbor?

A. They told us that,—we when we pass by we seen the scow there and they told us that Mr. Marincovich,—well, we was going to put a man on shore, but they said that Mr. Marincovich went to call up Friday Harbor, and told them at the same time to come after Mr. Anelich and take him to the Marine Hospital in Seattle.

Q. Then you didn't call any doctor, or have anyone else call a doctor until you got him into Friday Harbor?

A. Yes, Mr. Marincovich called the doctor.

Q. He called the Coast Guard too, you say?

A. Yes. Well, he told me that he telephoned for the Coast Guard from there.

Q. From up on the island?

A. Yes.

Q. What is the name of that bay?

A. Mitchell Bay.

Q. Is that the bay that you say Mr. Marincovich talked from?

A. Yes, I think that is what he told me, yes.

Q. And you later got to the telephone when you got into Friday Harbor?

A. Yes, sir, because they told me that the Coast Guard should be there at twelve o'clock.

Q. Who told you that, Mr. Mardesich?

[fol. 124] A. "Excel II", the man that brought the injured man into the town; when we got there he told me, he says, "Tony, don't worry about it", he says, "the Coast

Guard will be here at twelve o'clock", he says; "Mr. Marincovich, he call for the Coast Guard from Mitchell Bay", he says.

Q. And the Coast Guard didn't come?

A. The Coast Guard didn't come; and I seen the Coast Guard didn't come and we went and called the Coast Guard when we found he didn't come, my boy went and called him; I sent the boy because I wasn't able to go up there.

Q. When did you make that call?

A. Well, I couldn't tell you; somewheres around twelve o'clock, I guess, I couldn't recall just exact the time now.

Q. Is your son here?

A. No, I don't see him.

Q. Did you stay in Friday Harbor until the Coast Guard vessel came?

A. Yes, sir, I did.

Q. And did you assist in taking Mr. Anelich and putting him on the Coast Guard?

A. The boy did. I wasn't there.

Q. Mr. Mardesich, you say you pulled his boot off?

A. No, I didn't.

Q. Who did pull it off?

A. Well, I don't know who pulled it off because I was busy. I was looking after my job there so somebody else would not get caught.

Q. Now, you had stopped the winch?

A. Yes.

[fol. 125] Q. And it was still engaged by the clutch, was it not?

A. It was what?

Q. It was still engaged into the shaft so it could not run out?

A. Yes, I think it was; yes.

Q. And you had your line made fast around the bit?

A. Yes, sir.

Q. So that you could turn it loose, couldn't you?

A. Yes, I could turn it loose.

Q. And that winch would not run back wards?—it would not back out?

A. Oh, yes. You know, you put something that turns around in here loose on the shaft and you put something on it just like on a spool; you put a spool on a match and you

put the weight on a piece of string down there and it would turn around back, wouldn't it?

Q. Well, if the clutch is still engaged then the winch could not back up?

A. Yes.

Q. That is correct, isn't it?

A. No.

Q. No?

A. No, sir.

Q. Well, how could it back up?

A. Now, because that big weight that is hanging on to it, it would back it up.

Q. And if it backed up it would have to turn the engine over, wouldn't it?

A. No.

Q. Why not?

[fol. 126] A. Because the clutch is out.

Q. It is disengaged from the engine?

A. Yes.

Q. But still engaged with the clutch?

A. Yes; but the propeller is just a piece of shaft like on the two bearings, and that turns around, you know.

Q. Yes, I understand. Now, Mr. Mardesich, just one other question. Let's have you mark on this model here just where you were standing, on which side of this, at the time Mr. Anelich was hurt. Will you please do that for me?

A. I was standing, let's see,—I was standing on this side here (indicating).

Q. Well, mark an "M".

A. Approximately in there (indicating).

Q. On the starboard side just forward of the winch and near the after starboard side of the house. Now, where was Mr. Anelich standing?

A. He was standing on this platform here, on this deck.

Q. On the hatch cover?

A. Yes.

Q. Some place on there?

A. Yes.

Q. How much distance is there between where you were standing and where Mr. Anelich was standing?

A. Well, I'll tell you, the ropes was in here, those ropes what they coil up is in here.

Q. What is the distance between the two places?

A. If you have to go around it's in the way and you can't jump over this very well in here, but it's about eight or [fol. 127] *or* ten feet, or something like that, approximately; of course, I didn't measure it.

Q. Where did George Brajcich go after you took the line that had the load on it which was connected then with the boom on the vessel? Where did George go to?

A. George went to this davit; here is this davit, and here he was on this line. He disconnects his line here, and I put mine on that, and then he go and take his line off of the block and threw it over there and then Mr. Anelich take this one off and he's supposed to take this line off in here; he's supposed to take this one off here.

Q. And at that time, Mr. Mardesich, both the line that Mr. Anelich was handling and the one that George Brajcich was handling were slack?

A. Yes, sir.

Q. The weight had been taken off of them?

A. Yes, sir. The weight was on that hook there.

Q. Now, what did you do, Mr. Mardesich, when Mr. Anelich yelled?

A. Well, we all yelled then.

Q. I asked you what you did.

A. We all yelled. We yelled to stop the machine, or stop it immediately; you know, that winch goes around about two hundred revolutions a minute. When he caught in there and we all yelled, he stopped it immediately. Of course, it took the rope two or three or four times around.

Q. Now, what was going two hundred revolutions a minute?

A. That drum.

Q. The niggerhead?

A. Yes, about two hundred revolutions a minute.

[fol. 128] Q. Now, you are familiar with the arm that is just forward of the starboard corner of the winch that you shut off, or clutch in or clutch out, disconnect the power from your winch?

A. You mean the coupling?

Q. Yes.

A. Yes.

Q. I will ask you to state whether or not that picture shows that arm?

A. Yes, here's the arm here.

Q. This is the arm here (indicating)?
A. Yes.
Q. Would you just mark that "A" for arm. This is correct, it is, now?

Mr. Pierce: May we have that identified, Mr. Wallace, in some way so we will know what it is?
Mr. Wallace: Yes, I have no objection to having it identified now. (Having exhibit marked.)

Q. Mr. Mardesich, referring to Plaintiff's Exhibit "A", tell the jury if you will in what respect that picture differs from the actual facts as they existed, or conditions on your vessel on August 1st, 1933, at the time Anelich was injured.

Mr. Pierce: I am objecting to that as incompetent, irrelevant and immaterial.
The Court: I sustain the objection.

Q. Is that Plaintiff's Exhibit "A", Mr. Mardesich, a picture of the conditions on the deck of the "Arizona" on August 1st, 1933?
A. This arm was here but that stick wasn't there at that time.
[fol. 129] That stick was not there at that time?
A. No.
Q. Is there any other difference that you note?
A. No; just that stick in there.
Q. Just that stick is the only thing that is different?
A. Yes.
Q. Now, I believe you said this morning that you had never seen that stick?
A. Well, no, I didn't see it there, that's the reason I said that stick wasn't there.
Q. When have you last seen the "Arizona"?
A. The last I seen the "Arizona" was a couple days ago.
Q. Was that stick on there then?
A. I didn't see it.

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial; over a year having passed since the time this accident occurred.
The Court: It will be sustained.

A. I don't go on the boat and look at those things.

Mr. Pierce: Just a minute, Mr. Mardesich, after an objection has been sustained do not answer.

Mr. Wallace: We will offer Plaintiff's Exhibit "A" in evidence, if Your Honor please, at this time.

Mr. Pierce: Counsel agreed to connect it up; we object to it.

Mr. Wallace: He says the only difference in it as it is shown there and at the time he was on the vessel was the stick. I think we are entitled to have it go in.

[fol. 130] Mr. Pierce: They are supposed to show the condition by positive testimony. Now, you subtract this, and subtract that, and then you get the condition as it was; that is not the way to prove the condition on the day this accident occurred.

The Court: I overrule the objection.

Mr. Pierce: Did I understand Your Honor admitted the photograph?

The Court: Yes.

(Whereupon photograph referred to was received in evidence and marked Plaintiff's Exhibit "A".)

Mr. Wallace: You may inquire, Mr. Pierce.

Mr. Pierce: I reserve questioning until this witness is put on in chief, may it please the Court.

(Witness excused.)

[fol. 131] ALFRED LINCOLN, called as a witness on behalf of the plaintiff, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Wallace:

Q. State your name, Mr. Lincoln?

A. Alfred Lincoln.

Q. Where do you reside?

A. 331 Bellvue North, Seattle.

Q. And what is your business or occupation?

A. Civil engineer and contractor.

Q. Have you examined the clutch on the purse seine fishing vessel "Arizona" which operates the winch on deck?

A. Yes, I have.

Q. When did you first see that and examine it?

A. Last Saturday about three P. M., that is the first time I saw it.

Q. And have you seen it again since that?

A. I saw it about an hour ago.

Q. Describe to the Court the kind, or character, of the clutch that is used on that vessel?

A. There are several clutches.

Q. I mean the one to drive the winch.

A. The one to drive the winch is a square jaw clutch, and the one to drive the table is a spiral jaw clutch.

Q. Will you explain to the jury the difference between a spiral jaw clutch and a square jaw clutch?

A. That is a spiral clutch there.

[fol. 132] Mr. Pierce: I understood the witness was qualified as a civil engineer; I am going to object unless he qualifies as a marine engineer. I would like the privilege of asking questions or I will object to further answers upon the ground that he has not qualified himself as an expert.

The Court: I have not heard any questions asked that go to expert knowledge yet.

Mr. Wallace: No, Your Honor.

Mr. Pierce: I am objecting because he is not qualified.

The Court: I do not understand that counsel for the plaintiff examining has asked any questions of this one as an expert that call for any opinion evidence as yet.

Mr. Wallace: No, Your Honor.

Q. Referring to this clutch here, Mr. Lincoln, will you state to the jury whether that is a square jaw clutch or a spiral jaw clutch?

A. That is a spiral jaw clutch.

Q. Now, how does it differ from the square jaw clutch that you found on the "Arizona"?

A. The difference is, instead of being the spiral here, you cut it out square across here and let this come up square, and one comes into the other; it fits in like that; that is the only difference.

Q. Now, Mr. Lincoln, describe to the jury the clutch on the "Arizona", as you saw it, that connects the winch on the deck with the engine of the vessel.

A. That clutch is a square-jawed clutch. From my ex-
[fol. 133] amination of it I find that the plunger is badly worn at the corners,——

Mr. Pierce: Just a minute, now; that is objected to as incompetent, irrelevant and immaterial, the examination having taken place on last Saturday and over a year after this accident occurred, and having no probative value as to the condition of the clutch on the date the accident did occur.

Mr. Wallace: Just a minute; we have some authorities on that before the Court rules on it, that where a thing is charged to be old and worn out you have a right to show the condition that could only exist from wear dating back to the date when you claim it was worn out. Of course, we may fail on that but we have a right to show it though, and we cannot put all our evidence in in one lump sum.

Mr. Pierce: Then you have got to speculate and guess without any direct testimony of the condition existing at the time.

The Court: I overrule the objection. This is matter that goes to the weight and probative value rather than to the admissibility.

Q. Now, did you make any sketch of it, or print from it, Mr. Lincoln?

A. I have an impression of it back in the seat there that I took this noon.

Q. I wish you would get it and bring it over here.

A. (Witness securing impression.) That shows the clutch,——

Q. (Interposing.) Just a minute, Mr. Lincoln. This paper is what you made when?

[fol. 134] A. This was made this noon.

Q. And from what did you make that?

A. I made this from the square jaw clutch which is in existence on the "Arizona" now.

Q. And the one that drives the winch on the deck?

A. Yes, sir.

Mr. Wallace: I ask this be marked Plaintiff's Exhibit "B". (Having exhibit marked) Mr. Pierce, do you want to see this?

Mr. Pierce: I object as incompetent, irrelevant and immaterial, and having no tendency whatever to prove the con-

dition on August 1st, 1933; and having no probative value in this case.

Mr. Wallace: I appreciate that fact. I am going to connect it up.

The Court: Of course, I do not know what this is myself that you hold in your hand, Exhibit "B".

Mr. Wallace: It is an impression from the clutch as it existed today, showing, as we contend, its worn condition such that it could not be possibly said that it did not exist at least to some extent in 1933 on August 1st.

The Court: An impression from the clutch? Well, that does not mean a thing to me. I do not know what it means to another.

Mr. Wallace: Well, I will have the witness explain. I just asked Mr. Pierce if he wanted to see it.

Q. Now, Mr. Lincoln, calling your attention to Plaintiff's Exhibit "B", tell the jury just how that was made, and from what?

[fol. 135] A. This is a piece of paper turned over on the clutch and then outlined around, as it exists on the boat at noon today, and therefore it would give an impression of the worn part on it here. Instead of this clutch coming up here as it should do and fit close, this much has been worn off. Therefore, that being so, it has a tendency to slip, this being full of grease in here, unless the lever which throws this clutch in, or this one here, this lever here, unless this lever is held in that position to hold that clutch up tight it will naturally slip back this way and let the clutch ride out and slip.

Mr. Pierce: I want to move to strike the testimony of the witness as not responsive to the question, if the Court please.

The Court: Yes, it is granted, and it is stricken.

Q. Mr. Lincoln, how much, if any, has been worn off of that clutch?

Mr. Pierce: I object to this as purely speculative and mere guessing, unless he shows some information about the history of the clutch.

The Court: It will be overruled.

A. I haven't got a rule but if I had a rule here I could easily measure it exactly as to what had been worn because

a clutch fits snug when it's new. I would judge it's about three-eighths of an inch.

Q. What, if any, experience, Mr. Lincoln, have you had generally in the use and operation of equipment and machinery involving clutches similar to the one now on the "Arizona", and the one that is used there to drive the winch [fol. 136] on the deck?

A. A jaw clutch?

Q. No. What experience have you had?

A. I have had, well, about twenty years experience in the contracting game in which we use all kinds of machinery, donkey engines with spools on, or niggerheads similar to those used on a marine engine*r*, similar clutch; and this particular clutch is not patentable to any marine board itself because it is a clutch that is used on donkey engines also, and also on some of our grading machines.

Q. Are you familiar with the length of time, and the necessary use applied to clutches to produce a given amount of wear on them?

A. That would vary, Mr. Wallace.

Q. I say, are you familiar with that?

A. I am familiar with it so far as contracting is concerned, but I wouldn't say so far as the sea atmosphere, and that, is concerned, on clutches at sea. I don't know what difference that would make there. I couldn't give you that.

Q. State whether or not that clutch and all the wearing parts are saturated with oil?

A. Yes, more or less saturated with oil all the time.

Q. Now, you were going to tell us how much that is worn off. First, tell us, Mr. Lincoln, if you can, the depth of the jaw, or rather the female part of the clutch?

A. Well, from this impression it is an inch and a half.

Q. And the jaw part would be how long?

A. Similar, Oh, an inch and a half.

Q. Now, tell the jury how much of that jaw is worn off? [fol. 137] A. The portion left is three quarters of an inch, so apparently three-quarters of an inch has been worn off; that is in depth.

Q. Now, what is the effect on the clutch and its ability to stay enmeshed where it is worn as you have described this one was worn?

A. The worn portion of a clutch, or the hole left where the metal is worn out will generally fill up with oil and

grease and harden up with grit and other things. The result is, it will hold the clutch out, and that has a tendency to ride instead of going into place, and then it will jump and cut off the corner.

Q. What would you say, Mr. Lincoln, as to whether or not this jaw clutch that you have examined today on the "Arizona' was worn August 1st, 1933, having been used since?

Mr. Pierce: I object to that; the witness has not qualified.

Mr. Wallace: I think he is qualified to testify as to that. Well, we will withdraw that.

Q. Is that worn condition one of long standing?

A. That is a hard question to answer, Mr. Wallace, in so far as to the amount of work that this has been put to; as to how many months it has been in use; whether it has been in steady use or not; it's hard to say about that.

Q. Let us assume, Mr. Lincoln, that that vessel had been in operation during the fishing season from August 1st until approximately the middle of September, 1933, and then again in the fishing season beginning in May, 1934 and continuing up to the present time had been used during the [fol. 138] daytime, would you say that the worn condition of that clutch would be one of long standing, that is, one dating back to 1933, August 1st?

A. Oh, I would say it was of longer duration than that.

Q. Did you ascertain as a matter of fact what, if any, instrument was used on the "Arizona" to keep that clutch enmeshed?

A. Well, I didn't ascertain of any, but by seeing the lever which is up on deck,——

Mr. Pierce (interposing): Just a minute, now, I object to counsel testifying about something which counsel has made up here.

Q. Did you see anything on the "Arizona" that was used to gear this in, or hold it enmeshed?

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial until it be established that it was in that condition on August 1st, 1933 when this accident occurred; otherwise it has no probative value.

The Court: It will be sustained.

Q. Now, Mr. Lincoln, did you observe the sprockets that carry the chain on this clutch?

A. Yes.

Q. Describe to the jury their condition.

Mr. Pierce: That is objected to unless it be shown that it was in the same condition on the date of August 1st, 1933, the date this accident occurred.

The Court: It will be overruled. Again, I think the objection goes to weight and probative force rather than to admissibility.

Mr. Pierce: I want to call Your Honor's attention to this [fol. 139] one decision of the American Cotton Oil Co. vs. Davis, where the Supreme Court quotes with favor from 10 R. C. L., Evidence, 112, as follows:

"'As to proof of the condition of things subsequent to an accident, the rule seems to be that where the condition has not changed, the evidence is admissible. But unless the evidence relates to a time so close to the accident that it is apparent the condition has not changed, evidence as to the condition at a later period will not be received. The exceptions to this are where, from the substance of the matter, the lapse of time would not make any material difference.'"

Now, it is made to appear that this boat has been engaged in fishing since this accident had occurred. To endeavor now to find out what the conditions were on August 1st, 1933 by showing conditions now, seems to us it would not be of any assistance. That is our position based on the decision, the excerpt of which I call Your Honor's attention.

Mr. Wallace: I concede that is the rule, Your Honor, but we cannot from the mouth of every witness give all the testimony at one time. Now, I will show by another witness that shortly after this, to-wit, on December 21st, 1933, that this clutch was in practically the same condition then as it is now.

The Court: The objection is overruled. Read the question please.

(Question read by reporter: "Now, Mr. Lincoln, did you observe the sprockets that carry the chain on this clutch?" Answer: Yes. Question: Describe to the jury their condition.")

A. Yes, I did.

Q. And what condition were they in, Mr. Lincoln?

[fol. 140] A. They were in pretty bad condition. The ends of the sprockets were broken off in several places, and pretty badly worn,—cut down pretty deep.

Q. And would you say from your experience in the handling of equipment,-and particularly clutches of this nature, and sprocket gears, that that condition is one of long-standing?

Mr. Pierce: Objected to upon the ground the witness is not qualified to so testify.

The Court: It will be overruled.

Q. Is it one of long-standing?

A. Oh, yes; it is of several years standing.

Q. Several years?

A. Several years.

Q. And you think that it would ante-date August 1st, 1933?

A. Oh, yes, it certainly would do that.

Q. What, if anything, would be the effect in actual operation of this worn condition of the clutch?

A. The clutch being worn, it would have a tendency to slip out.

Q. Now, how did you, if you did find anything as to how it was kept in gear?

A. Yes; the lever that throws the clutch in to engage the clutch was braced by a piece of wood.

Q. Calling your attention to Plaintiff's Exhibit "A" I will ask you to state whether or not that piece of wood that you have spoken about is shown on that picture?

Mr. Pierce: My objection runs to all of this so I won't constantly have to interrupt, that it is incompetent, irrelevant and immaterial, and not showing any condition that [fol. 141] existed, or can be proved to have existed, on the boat the day of this accident; the specific testimony being with reference to the question now being asked that it was not braced with that wood on the day that the accident occurred.

The Court: I sustain the objection.

Q. Mr. Lincoln, did you observe the piece of wood that is shown on Plaintiff's Exhibit "A" with a notch in the end of it and tied with a cord to the starboard bit of the winch,

and which is forked into the lever that controls the operation of the winch?

A. Yes, I made an outline of it there on a piece of cardboard.

Q. Describe it, Mr. Lincoln, in detail.

A. The outline of that speaks for itself, from the shape of it Mr. Wallace.

Q. Is this the outline of it, you say?

A. That is the outline of it.

Q. The markings on this paper?

A. Yes.

Q. What are these notches?

A. This is just a piece of cardboard I picked up; I laid the piece of wood on it and just run around it with a pencil.

Q. Did you observe its condition as to being new or old?

A. The piece of wood apparently has been in use for sometime, because it has even been painted so that the painting of it would be in keeping with the boat.

Q. Was it painted the same color as the boat?

Mr. Pierce: Objected to as leading.

Mr. Wallace: Yes, it is leading.

[fol. 142] Q. Tell what color it was.

A. The piece of wood is painted green in keeping with the surrounding paint close to it.

Q. Now, what condition did you observe as to its newness, or oldness?

A. Well, it's apparently a piece of wood that has been frequently in use for a long time.

Q. Was it worn?

A. Oh, yes, yes. It shows chafing where it apparently has been used steadily.

Q. Any other marks of age on it?

A. No, not beyond the chafing.

Q. What about its busted condition?

Mr. Pierce: Now, just a minute, I am going to object to counsel endeavoring to testify, especially with the expert he has got.

Mr. Wallace: He is not testifying as an expert now.

Mr. Pierce: Oh, I thought he was.

Mr. Wallace: He is testifying as to what he saw.

Q. State whether or not, Mr. Lincoln, this piece of wood has been busted open?

A. Yes; and wired at one place.
Q. Did you observe whether or not it was cracked?
A. Yes, you can faintly see the crack in it.
Q. And how was that repaired?
A. By wire. It had wire around it here. (Indicating.)

Mr. Wallace: I would like to pass that to the jury so they can look at it.

[fol. 143] Mr. Pierce: I want to renew my objection before it is passed to the jury.

Mr. Wallace: That is in evidence, the jury has a right to look at that.

Mr. Pierce: I will make my objection anyhow. It does not show any condition that anybody has testified that existed in August, 1933, but a condition that existed in November, 1934, and over a year after this accident occurred; and I also object as being incompetent, irrelevant and immaterial, and no probative value in this case.

The Court: It will be overruled.

(Passing exhibit to jury.)

Mr. Wallace: I want to have this marked as an exhibit.
(Having model of boat marked as exhibit.)

Q. Calling your attention, Mr. Lincoln, to Plaintiff's Exhibit Number "C" for identification I will ask you to explain to the jury just how the winch is operated by the mechanism in the "Arizona" in tact as you saw it, illustrating it with this Plaintiff's Exhibit "C".

A. This is apparently supposed to be a copy of the lever which is now in existence on the "Arizona", which goes down below deck. I think you can see the connection down below here which throws this clutch in and out. The clutch is out now.

Mr. Pierce: Can you operate that clutch by turning the propeller?

The Witness: That is the only way we can do it.

Mr. Pierce: That is not a model of the boat then.

[fol. 144] A. Now, the condition of this clutch here as shown is not the same clutch you have, or similar clutch to what is on the boat; this is more a split clutch type instead of a square jaw clutch, that is the only difference here. The principle of working is exactly the same. Now, the clutch

that is on the boat that I saw today is worn so on the corners that unless pressure is put here to hold this in there it will ride and will not connect itself. Down in the corner there is a lof of grease down there which is naturally going to get in any machine and no one can keep it out; as a result grease gets in there and when the corner is worn off, a rounded corner as shown here, you get the corner worn off the clutch here, rounded off, and it will have a tendency to ride itself out again and not stay in there unless you put pressure on here. Now, you see if you put pressure behind here, and that is apparently what this stick which they have got on the boat has been used for——

Mr. Pierce (interposing): Now, I am objecting to that as a mere conclusion of the witness, and argumentative, and move it be stricken.

The Court: Yes. The statement of the witness as to what the stick has been used for is stricken.

Q. Mr. Lincoln, is that just your sketch?
A. No; that is the stick put right in place on top there.

Mr. Wallace: I will ask to have this marked as an exhibit. (Having exhibit marked.)

Q. Calling your attention to Plaintiff's Exhibit "D" I will ask you to state how you made that, and from what you made it.

[fol. 145] A. I made it from a stick hanging at the side of the niggerhead, or winch, which is hanging there; laid it on top of it, and just run around it with a pencil.

Q. And you did that today?
A. Noon today.

Q. Would you say, Mr. Lincoln, that that is the same stick that is shown in Plaintiff's Exhibit "A"?

Mr. Pierce: That is calling for a conclusion of the witness, and a matter upon which anybody can pass. He has not certainly seen the stick at the time the picture was taken, and he is just guessing at that so I object on that ground.

The Court: I sustain the objection.

Mr. Wallace: You may inquire, Mr. Pierce.

The Court: There will be a recess at this time of ten minutes. The jurors may retire to the jury room.

(Jury retire to jury room.)

(Recess.)

(Jury return to jury box.)

Mr. Wallace: May I ask another question before you take him?

By Mr. Wallace:

Q. Mr. Lincoln, will you sketch on here the square jaw clutch that you found on the "Arizona"?

(Witness doing as requested.)

Mr. Wallace: I am going to ask that this be marked as an exhibit. (Having exhibit marked.)

Q. Mr. Lincoln, will you just mark opposite cross lines on the female part of the clutch so that we can identify that [fol. 146] from the other side? (Witness doing as requested.) Calling your attention to Plaintiff's Exhibit Number "E", does that sketch correctly represent the clutch that you found on the "Arizona" that operates the winch on the deck?

A. That is the idea of the clutch but it is not to scale; it is just the sketch. That is the principle of it.

Q. And the part of it that contains the straight lines, the single lines, is the part that inserts into the opening in the female part of the clutch?

A. Correct.

Q. That is indicated by cross marks on the female part?

A. Correct.

Mr. Wallace: We offer this in evidence, if the Court please.

(Whereupon sketch of clutch referred to was received in evidence and marked Plaintiff's Exhibit "E".)

Mr. Wallace: You may inquire, Mr. Pierce.

Cross-examination.

By Mr. Pierce:

Q. You live in Seattle, I understand, Mr. Lincoln?

A. Yes.

Q. And your present business is what?

A. Civil engineer and contractor.

Q. What are you working at, civil engineering or the contracting?

A. Both of them.

Q. Have you an office there?

[fol. 147] A. No, I have no office.

Q. What contracting have you had in the last few years?

A. I was General Superintendent on the Denney Regrade.

Q. You didn't use any boats on that job?

A. No, but we had several machines there with the clutch principle exactly the same as on this.

Q. Had you ever prior to November 10th, 1934 examined any clutch on a fishing vessel?

A. No.

Q. Were you ever engaged in the fishing business?

A. No.

Q. Did you ever at any time examine any other fishing vessel for the purpose of ascertaining the condition of its clutch?

A. No.

Q. Have you ever made any examination of the clutch for the purposes of determining the amount that it would wear in a year on a fishing vessel under conditions similar to that on the "Arizona"?

A. Not on a fishing vessel, no.

Q. You have not any idea of your own knowledge of the amount of use to which a clutch is subjected to during any one fishing season?

A. No.

Q. All you testified to is something that you found on the "Arizona" on the 10th day of November of 1934, and again on the 13th day of November, 1934?

A. That is hardly correct, Mr. Pierce. I have testified as to clutches similar to the one on the "Arizona" and the natural conditions when you have got a worn clutch what [fol. 148] trouble you are going to look for.

Q. But you haven't any direct knowledge of the condition of that clutch in 1933?

A. No; oh, no.

Q. Where did you go on the "Arizona"?

A. Where did I go on it?

Q. Yes.

A. Well, on Saturday it was down at one of the docks down here, and today I went out in the river out here.

Q. Accompanied by anybody?

A. Yes, there was another party with me.

Q. Who?

A. Mr. Hurd.

Q. Who is that?

A. Mr. Hurd.

Q. Is he associated in business with you?

A. No.

Q. Is he interested in this case in any way, do you know?

A. Not that I am aware of.

Q. Does he live in Seattle or in Everett?

A. Yes, he lives in Seattle.

Q. And you made an examination at whose request?

A. Mr. Wallace's.

Q. And the first time you were asked to make an examination of this clutch was on the 10th of November, this year?

A. A couple days ahead of that; I presume about that time; sometime last week anyhow.

Mr. Pierce: That is all.

(Witness excused.)

[fol. 149] Mr. John B. Hurd, Jr., called as a witness on behalf of the plaintiff, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Wallace:

Q. State your name, Mr. Hurd.

A. John B. Hurd, Junior.

Q. Where do you reside, Mr. Hurd?

A. In Seattle.

Q. When did you first see, if you ever did see, the purse seine fishing vessel "Arizona"?

A. I don't remember the date when we took the pictures up there. I think you have the date on that.

Q. Calling your attention to Plaintiff's Exhibit "A" I will ask you if that is the picture you refer to?

A. Yes, that is the picture.

Q. And what date was that taken, Mr. Hurd, if you know?

A. Well, it was sometime in September; September 21st of last year.

Q. Were you present at the time that was taken?

A. Yes, sir.

Q. Did you see a stick propping the arm of the lever that operates the clutch that runs the winch on the deck at that time?

A. Yes.

Q. Is that shown in that picture?

A. Yes, sir.

Q. Did you see the "Arizona" that day?

[fol. 150] A. Yes, sir.

Q. And did you again see that stick on the "Arizona" today?

A. Yes, sir.

Q. Is that the same stick that you saw on the "Arizona" on September 21st, 1933?

A. Yes.

Q. I hand you another picture and ask you if you can identify that?

A. Yes, I can.

Q. When was that taken, Mr. Hurd?

A. The same day as the other one, September 21st. (Having exhibit marked.)

Q. What vessel were these pictures taken on, or what is the vessel that this winch was on?

A. Taken on the "Arizona" purse seiner.

Q. I will ask you to state who is holding their hand on the stick?

A. I am.

Q. That is your hand, is it, Mr. Hurd?

A. That is my hand.

Q. And that was taken at the same time that Plaintiff's Exhibit "A" was taken?

A. Yes, sir.

Q. And is that the same stick?

A. That is the same stick.

Mr. Wallace: We offer this Plaintiff's Exhibit "F" in evidence.

Mr. Pierce: Objected to as having no probative force.

[fol. 151] (Whereupon photograph referred to was received in evidence and marked Plaintiff's Exhibit "F.")

The Court: It will be overruled.

Q. Mr. Hurd, at that time did you examine the clutch that connects the machinery that operates the winch on the deck?

A. I did.

Q. Describe it to the jury, Mr. Hurd, as you saw it at that time.

A. Well, it was what we call a square jaw clutch, and the work inside of the jaws were very badly worn.

Q. How would you compare the worn condition that you observed on September 21st, 1933, with the worn condition that you observed today when you examined it?

A. Well, practically the same. Those things are all grease; they don't wear very fast.

Q. Is that the same clutch that is on the "Arizona" today that was on there when you examined it September 21, 1933?

A. So far as I could tell it looks like the same one.

Q. Did you observe the sprockets that drive the chain on that clutch?

A. Yes.

Q. Describe their condition to the jury as to whether or not they were worn.

A. The one down on the clutch was the only one I looked at in particular, and that was quite badly worn.

Q. State what the stick that you saw on the vessel at that time, September 21st, 1933, that you are holding in your hand while the picture Plaintiff's Exhibit "F" was being taken, and that you saw there today which you described as being the same stick, was used for, Mr. Hurd.

[fol. 152] A. Well, after examining the clutch, and my experience with a clutch of that kind, if you don't have some way of holding the clutch jaws together when they get worn they won't run only a few turns and they come out. That stick is apparently put there and tied there with a little string so it does not get loose, so it holds the lever which engages the clutch.

Q. Now, Mr. Hurd, was that stick painted at any time?

A. The stick was painted green and it looked like quite old paint, having been chipped in a couple places.

Q. State whether or not it had been split, or busted?

A. It had been split at sometime and it was tied together to keep it from coming apart again.

Q. And was it in that condition on September 21st, 1933?

A. Yes, just exactly.

Q. State what, if any, conditions indicated its age, if you can.

A. Age of what?

Q. The age of the stick—how long it had been in use there.

A. Well, that is pretty hard to say about a piece of wood, but the corners were all round, and it was apparently tied several months before. It didn't look like it was newly repaired, or anything. The string that held it on there showed that that had not been recently put on, when I first saw it.

Q. And that was the condition that you found September 21st, 1933?

A. Yes, sir.

Q. And that same condition exists there today just as it did then?

[fol. 153] A. Yes.

Q. Is there any evidence that you could see that it has been removed in the meantime?

A. No.

Q. How is it held against the bit? What supports that end of it next to the bit?

A. Well, there is a little plate nailed on there.

Q. And were those cleats on there when you examined it in September 21st, 1933?

A. Yes, sir.

Q. And they are still there?

A. Yes.

Q. Mr. Hurd, what, if any, experience have you had with engines and machinery generally?

A. Oh, I've worked on machinery in saw mills, locomotives, marine engines, and big Diesel engines, and things, since about 1912. I've seen lots of those similar clutches used in mills, on conveyors, and various places.

Q. Are you familiar with Diesel engines such as you found in the "Arizona"?

A. Yes, sir.

Q. Can you tell us, if you know, the speed of that engine that is on the "Arizona"?

A. The full power speed is, I think, three hundred and twenty-five, or somewheres around there, and running light they usually run about a hundred or a hundred and twenty-five revolutions a minute.

Q. Now, describe to the jury the mechanism from the engine to the winch on the deck.

A. Well, the engine sets in there and then it has a reverse [fol. 154] gear—it is not a reversible engine, it has clutches; and then there is a flange coupling, and then after that there is a series of these jaw clutches, one to run the winch, the first one.

Q. And describe that to the jury; how the power is transmitted when you get to the winch?

A. This small sprocket on the jaw clutch, there is a short counter shaft directly over that, and of course there is two sprockets on the counter shaft, and one of those connects with the gear of the chain from the winch.

Q. Now, tell the jury whether or not that is so geared as to speed up the revolutions, or reduce them?

A. Well, I didn't count the teeth, but as close as you can tell the gear on the engine shaft is half as big as the one that drives on the counter shaft, and the small one driving the winch from the counter shaft is half as big as the one on the winch; it slips down to about a quarter speed.

Q. At that running speed of that engine how fast would these drums, or niggerheads, be turning over?

A. I would say between thirty and fifty revolutions a minute.

Q. What, if any, effect would salt water have on this clutch if any salt water got to it, in its wearing?

A. Well, I've had quite a little experience with that kind of stuff. We just recently pulled up a boat which sank during the storm, and anything that is covered with grease like that, the salt water doesn't seem to affect it unless it's submerged long enough to soak the grease off. All the levers and things which didn't have oil in the "Arizona" [fol. 155] showed considerable rust, but the clutch does not.

Q. What, in your opinion, Mr. Hurd, would you say the worn condition on this clutch would indicate as to age?

A. Well, it couldn't possibly get that way in the use that it has had in three or four years; it couldn't possibly. It would be much longer than that.

Q. In your opinion, Mr. Hurd, would that clutch stay enmeshed with a three ton load on it if this stick was not used, or some other method of holding it in?

Mr. Pierce: I object to it. The hypothesis has not been established by anything in this case. I have not heard anything about a three ton load before.

Mr. Wallace: Mr. Mardesich said it was a three ton load on it.

The Court: It will be overruled.

A. Well, it might if it was standing still, but you couldn't start it; it wouldn't turn only one or two turns before it would work out of place.

Mr. Wallace: You may inquire.

Cross-examination.

By Mr. Pierce:

Q. That is your guess?

A. Sir?

Q. That is your guess of it?

A. No, that is not a guess.

Q. Well, do you know the boat has been operating now continuously pulling those loads without that stick, and it has not slipped now for over a year and a half since this occurred?

[fol. 156] A. I only have your word for that.

Q. Well, do you have anyone else's word to the contrary?

A. No.

Q. Supposing I am right, then what would you say about your guess?

A. I still don't think it would be a guess because I've seen so many of those operate.

Q. You base your testimony on, you say, a three ton load that Mr. Mardesich testified to. Now, supposing that boat has pulled for five months this summer more than three ton loads without slipping, then what about your guess?

A. Well, even if you had only two hundred pound loads on it that clutch wouldn't run without being held in some way.

Q. Well, supposing it has run all summer without doing it, then what would you say about your guess?

A. Well, I would have to see that first.

Q. You would think you were a little bit wrong if it actually had run all summer?

A. Yes, I would think so if it actually had done that.

Q. You have never worked on a fishing boat?

A. No, I haven't.

Q. You haven't any idea how heavy use the machinery is put to each year?

A. Yes, I have a pretty good idea from talking to fishermen.

Q. I mean from your own observation.

A. No.

Q. And I understand that you are predicating your testimony on the theory that salt air—being near salt water, does not make a particle of difference to machinery?

[fol. 157] A. That all depends upon the machinery. I said that the levers and the connecting lines, and stuff, on this particular boat showed considerable rust but there is no evidence of rust on the clutch and shaft.

Q. Who went with you at the time you took these pictures?

A. Mr. Wallace and the photographer from Everett here.

Q. And who took the pictures?

A. The photographer.

Q. Who moved the stick so as to put it up against the clutch?

A. I did.

Q. It wasn't on that position then when you got on the boat?

A. It was hanging on the string.

Q. It wasn't in the position of being the clutch lever, and you moved it up and then took a picture of it?

A. Yes.

Mr. Pierce: That is all. I move the picture be stricken from evidence as a situation created entirely by the photographer and his expert witness.

The Court: It will be denied.

Mr. Pierce: That is all.

Mr. Wallace: That is all, Mr. Hurd.

The Court: Well, I think this is a good time to adjourn until tomorrow morning at nine thirty. The jurors subject to the instructions given at the outset of the trial are so excused until tomorrow morning at half past nine o'clock.

(Whereupon adjournment taken at 4:30 o'clock P. M., until Nov. 14th, 1934 at 9:30 o'clock A. M.)

[fol. 158] 9:30 o'clock A. M., November 14th, 1934.

The Court convened pursuant to adjournment; all parties present as heretofore with counsel; jury in the jury box.

COLLOQUY

Mr. Wallace: If the Court please, I offer in evidence a stipulation signed by counsel, and ask it be marked as an exhibit in the case.

The Clerk: Exhibit "G".

Mr. Pierce: Is that the one with reference to the hospital?

Mr. Wallace: Yes.

Mr. Pierce: We object, not to the stipulation of the fact, but as to its competency, as incompetent, irrelevant and immaterial, and having no bearing upon the issues in this case.

The Court: Yes, it is not evidentiary. It is simply an agreed fact, or facts.

Mr. Wallace: I think I should read it to the jury.

Mr. Pierce: We object to its competency. Now, I agreed there was a hospital at Victoria and Bellingham; I am not disputing that fact. I am challenging the competency of that fact in the trial of this cause.

The Court: It is simply admitted facts. You may read the admission to the jury if you wish.

Mr. Wallace: Yes, Your Honor.

[fol. 159] "It is hereby stipulated and agreed that as a matter of fact there was on the first day of August, 1933, in the Cities of Seattle, Bellingham and Everett, Washington, and the City of Victoria, B. C., ample Hospital facilities with skilled physicians and surgeons and trained nurses for proper treatment and care of personal injuries".

I want to recall Mrs. Anelich for another question.

ANTONIA ANELICH, resumed the stand for further examination on behalf of plaintiff, and testified as follows:

Direct examination.

By Mr. Wallace:

Q. State to the jury, Mrs. Anelich, what the condition of health of Mario Anelich was at and prior to August 1st, 1933.

A. Oh, he was all right. He never was sick. I was mar-

ried twenty-one year and I never seen him go to the doctor but just a couple times for a cold, that's all.

Q. What was the condition of your health at that time and prior thereto?

A. I was all right and I was weighing at that time 170 pounds and I lose 29 pounds.

Q. What, if any, amount did you pay out for funeral expenses?

A. I paid four hundred,——

COLLOQUY.

Mr. Pierce: Just a minute, Mrs. Anelich. That is objected to as incompetent, irrelevant and immaterial, and not a proper item of damage. This is an action under the Fed- [fol. 160] eral Act and such expenses have never been an item of damage under the Federal decisions.

Mr. Wallace: There is a stipulation.

Mr. Pierce: All I stipulated is they might allege it, but I did not stipulate as to its competency.

Mr. Wallace: Yes, I agree, that is correct. We may be heard on the matter if the Court has any doubt about the matter being proper.

The Court: Well, I have doubt upon it.

Mr. Wallace: If the Court please, this action is being brought by the plaintiff, who is now on the witness stand, as administratrix of the estate of Mario Anelich. The Jones Act which embodies in it the general maritime law of the United States is silent as to the,—Federal Employers' Liability Act, common carriers by rail,—is silent as to funeral expenses. It is a well settled rule of law in this country that wherever Congress has acted then the state is not free to act or legislate on that subject where it is a matter which Congress has plenary power to legislate upon.

Now, Congress has not legislated upon the question of the right to recover money expended for funeral expenses. Therefore, it leaves the rule laid down by the Supreme Court of the State of Washington still in force, giving to an administratrix the right to recover for the use and benefit of the estate the amount of money that has been expended for funeral expenses. There is no reason why we should not be permitted to prosecute this item of loss that the estate has suffered in this action because it is not taken away from us by either the Jones Act or the Federal Employers' Lia-

[fol. 161] bility Act which is embodied in the general maritime law. I think we are safe on that. I think that is a sound principle that entitles us to recover that under the laws of this state, and repeatedly our Supreme Court,—I remember carrying to this Supreme Court the case of a young man against the Tacoma Gas & Fuel Company in which that question was raised, and I was convinced then that they could not recover funeral expenses and made my argument in that case on the certain basis and theories that I thought were correct. However, the Supreme Court decided against me and allowed funeral expenses to be recovered in that case. Now, if that right has not been taken away from the citizens of the State of Washington by some act of Congress in a matter of which they had plenary power to legislate, (and we concede they did in this matter),—all maritime matters are within the jurisdiction of Congress to enact legislation on; and they have not taken that right away from us, and therefore we contend that we have it under the state statute. We don't have to recover all under any one particular statute; we may go under as many statutes as we have causes of action.

Mr. Pierce: Of course, the allowance of funeral expenses in this case are under a statute entirely different from the Federal statute, and in reversing itself in the gas company case the Supreme Court did not give any reason for it; it simply reversed itself, having refused the funeral expenses in the first case, and on a rehearing simply said they were wrong and allowed them. However, it is now clearly established that the Federal Government having acted by and [fol. 162] through the Jones Act, the state statutes are entirely eliminated in a suit under the Jones Act. That is decided in the Lindgren case very clearly in 281 United States, positively and definitely decided. I have three cases here in which now it has been specifically held under the Federal Act in the case of the Federal employee that neither funeral expenses nor medical bills are allowed, that being under the theory that under the Federal Act the action is for the benefit of the widow and children and not for the benefit of the estate, and neither the widow nor the children having made the money themselves, there can be no recovery by a trustee bringing a suit in their behalf.

The three citations against the allowance are Delaware, L. & W. R. Co. vs. Hughes, Circuit Court of Appeals, Sec-

ond Circuit, 240 Federal, 941; Philadelphia & R. Ry. vs. Marland, Circuit Court case, 239 Federal, 1, and Collins vs. Penna. R. R. Co., 148 N. Y. Supp. 777.

The case in 239, page one, cited by Buffington, McPherson, and Woolley, an action brought under the Employers Liability Act of April 23, 1908 against the railroad company for negligently causing the death of plaintiff's intestate, her husband. They go into the general questions before they get down to this question of an allowance.

The other case of Delaware, L. & W. R. Co., in 240 Federal, page 941, being the Circuit Court of Appeals for the Second Circuit, reads: "The federal Employers' Liability Act of April 22, 1908, makes no provision for funeral expenses in [fol. 163] such a case as this. In Collins vs. Penna. R. R. Co., 163 App. Div. 452, 148 N. Y. Supp. 777, the court said:

'The federal Employers' Liability act provides that the damages in case of death of an employee are for the benefit of the next of kin dependent upon such employee, for such injury or death. No provision seems to be included or intended by the federal act to compensate for the expenses of burial, and, therefore, the testimony received by the trial court under defendant's objection as to such funeral charges was erroneous.'

"We are of the opinion, therefore, that the allowance of $215 for funeral expenses was erroneous and that the judgment should be reduced to that extent."

Now, in the Lindgren case, without reading it fully I think I can read the title sufficient to cover it: "Section 33 of the Merchant Marine Act of June 5, 1920, 41 Stat. at L. 988, Chap. 250, U. S. C. title 46, 688, giving to the personal representative of a seaman dying as a result of a personal injury suffered in the course of his employment, the same right of action for damages as is conferred in the case of railway employees by the Federal Employers' Liability Act, supersedes the application of the death statutes of the several states, and precludes a resort thereto, either to create a right of action not given by the Merchant Marine Act, or to establish a measure of damages not provided by the act.

"2. No right of action for the death of a seaman, though occasioned by unseaworthiness of the vessel, exists under general maritime law."

Now, I shall be glad if Your Honor desires to read this full discussion; it is an opinion by Justice Sanford:

"In the light of the foregoing decisions and in accord-[fol. 164] ance with the principles therein announced we conclude that the Merchant Marine Act—adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers' Liability Act—establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the states and is as comprehensive of those instances in which reference to the Federal Employers' Liability Act it excludes liability, as of those in which liability is imposed; and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject."

Now, that is the latest expression of the United States Supreme Court with reference to the matter.

Mr. Sweany has now marked for me the original case, this is the part we could not at first find:

"In cases brought under the Employers' Liability Act, the only right of recovery is that conferred by the statute, and the damages recoverable are only such as are named by its terms. The Supreme Court has repeatedly held that in actions under this act the measure of damages is the pecuniary loss resulting from death and sustained by the designated beneficiaries. This is usually limited to loss of support, though extended by the amendment of 1910 to conscious pain and suffering endured by the decedent. Excepting as enlarged by statute, the pecuniary loss of a widow and children resulting from death can be no more than from the nature of their relation to the deceased they can sustain.

"The widow and children cannot sustain loss for funeral expenses of the husband and father because they are in no sense liable for them. Liability for funeral expenses rests upon his estate, for loss to which a right of action is

otherwise afforded. As the widow and children cannot sustain such a loss, damages for such a loss cannot be included in damages awarded exclusively for their benefit. Damages recovered in an action under the act are 'in trust for the designated individuals'.

"Therefore in a suit brought for their benefit, damages may not be recovered for the benefit of the decedent's estate.

[fol. 165] "We are of opinion, that in the rulings and charge of the court including funeral expenses as an element of damage, there was error."

That seems to be the rule, as I understand it.

Mr. Wallace: That is a correct rule, if the Court please, and that is just our contention here, that the Jones Act made no provision, and that is exclusive to the extent that it went, and the Court says there that the plaintiff in the case cannot recover for herself and the children these funeral expenses because that is not given to her; but as administratrix of her deceased's husband's estate she may recover. And it says in there that it is otherwise provided for funeral expenses. Now, there is no statute in the State of Washington giving funeral expenses. The state legislature is silent upon that subject but the Supreme Court of the State of Washington says that the administratrix of the estate has a right to recover funeral expenses, and has so held, and certainly that right has not been taken away by statute which is silent on the matter.

The Court: This action is one maintained by virtue of federal or congressional enactment solely.

Mr. Wallace: I don't think the Court should say "solely".

The Court (continuing): And we must take that Act of Congress with the interpretation that the Federal Courts have placed upon it, and it would seem clear from these authorities that those courts hold that in an action brought pursuant to the Act of Congress the expenses of burial are not recoverable, that action not being maintained for the [fol. 166] benefit of the estate but solely and wholly for the benefit of the dependents or beneficiaries of the trust contemplated by the Act of Congress.

Now, of course, this is not to hold at this time that in an action brought for that purpose under state law the administratrix could not recover for the benefit of the estate

the expenses of this burial. It may be that the acts of Congress would be held to so far supersede all state law where maritime injury is involved, that such recovery would not be permitted in an action under state law; or better, perhaps, that an action under state law could not be maintained at all. But we have not reached that point. We have simply the question of whether in this action brought under the Act of Congress for the recovery of damages for maritime injury, or causes alleged to have resulted in death, the item of funeral expense can be recovered. It is true that plaintiff is the widow; it is true that plaintiff is the administratrix; but it does not follow that she maintains this action for the benefit of the estate. She is simply that one who the Act of Congress have designated as the agent or trustee of the next of kin and the beneficiaries of any recovery there might be for the purpose of maintaining this nature of action.

She does not sue here for the benefit of the estate, but sues for the benefit of the ones designated in the statute, —herself, and these children,—whom it has been testified the deceased left surviving him.

Mr. Wallace: I wish Your Honor before concluding in this matter would read the case of Phillips vs. Baltimore [fol. 167] etc. Line. It has no relation to funeral expenses but in that case I will tell the Court just exactly what the situation was: A young man was employed on the vessel and was injured, and as a result of his injuries a leg was amputated. He commenced an action in the Admiralty Court to recover because of alleged unseaworthiness of the vessel resulting in his injury, and that was tried by the Court without a jury. The Court found that there was no proof of unseaworthiness of the vessel, and therefore refused to allow him to recover an indemnity which the law provided he may recover; but did hold that he was entitled to his maintenance and cure; for that the Court allowed $500.00. That judgment was promptly paid. And another action was then commenced in the law side of the Federal Court, as I recall it, to recover under the Jones Act, believing however that he had a right to maintain an action at law under the Jones Act, and a recovery was had in that case of some fifteen thousand dollars, and finally reached the United States Supreme Court where they were called upon to determine whether or not the decision of the

Court in the Admiralty case was res judicata and they held that it was,—very much to their regret to do so,—and the Court has gone to great length in saying what the rights of persons are that are sueing. And I am satisfied if Your Honor will read that case, (I will give you the citation), that Your Honor must be convinced that unless this plaintiff now sueing here as she does as administratrix of the estate, which we regard as the personal representative of the deceased, unless she can recover that item of funeral [fol. 168] expenses in this case, if she has a right to do so, it is res adjudicata and she never can recover it, and no administrator of the estate will ever be able to recover it. You must sue for all of your causes, all your injuries, and all your losses, and whether you are sitting in a dual capacity or otherwise we cannot have a duplication of lawsuits. It must all be settled in one, and there is no reason why it should not be. There is no reason why she cannot recover her- a certain specified sum designated by statute, and at the same time in her capacity as administratrix of the estate recover an item which would be entirely for the use and benefit of some other person or the estate. It is the estate of a deceased husband that is entitled to the funeral expenses if there is any right to funeral expenses. I think if the Court will read that case it would be very enlightening and I think the Court would be convinced that unless this item is recovered here that this action would be a bar to any other cause regardless of whether you assert a claim or not, you are barred on all questions which would have been, or could have been asserted and claimed according to the ruling of that court.

The Court: I do not think this argument in any wise requires me to alter my position. As I attempted to say, it may be that plaintiff here could have joined an action under state law for the recovery of funeral expenses with this action that she has brought.

Mr. Wallace: That is what she has done.

The Court: No, she has pleaded only one cause of action; that for injuries causing death, and that under the Act of Congress.

[fol. 169] Mr. Wallace: Well, we have this stipulation here in which our complaint is amended. Does Your Honor see that?

The Court: Yes.

Mr. Wallace: Which declared that she has paid out and expended $400.00 funeral expenses.

The Court: That does not constitute the pleading of another cause of action. At most it amounts to putting into this pleading in this cause of action something that is irrelevant and immaterial to it.

Mr. Wallace: I don't understand, Your Honor, that under the laws of our state we are compelled to set out two different causes of action unless the defendant thinks that for their protection it is necessary and requires us to set out and state and number the different paragraphs. All you need to do to charge a cause of action in the State of Washington is to state in brief and concise language the facts. Now, we have stated the facts; that constitutes a cause of action as much as if we had filed a separate paper with the title of the Court and cause and charge as to the corporate existence, if there are such, and the residence and legal capacity of the parties in the matter. That is all set forth. I see no reason,—and it is not necessary to say,—that we are claiming this particular item under the laws of the State of Washington, and some other item under the laws of the United States. If we have a right that is given to us to use any statute, we have a right to recovery.

The Court: No; the pleading as amended pursuant to [fol. 170] stipulation simply contains an allegation of damage which I hold cannot be recovered.

Mr. Wallace: Then, we except the ruling of the Court and at this time ask permission to make our proof. We will offer proof——.

The Court: You may make an offer of proof.

Mr. Wallace: We offer to prove by the witness on the stand that for and on account of the funeral expenses of Mario Anelich she has expended on behalf of the estate the sum of $400.00., and that that amount was a fair and reasonable sum to be expended necessarily for his burial and funeral.

Mr. Pierce: To which offer the defendant excepts.

The Court: The objection of the defendants to the offer is sustained for the reasons indicated.

Q. Mrs. Anelich, I am not quite clear on your evidence as to your own health. You stated as to your weight, but

what was your condition of health you were in on August first and for a long time prior thereto?

A. I was in good health.

Mr. Wallace: That is all.

Mr. Pierce: No questions, Mrs. Anelich.

(Witness excused.)

[fol. 171] ROMELDA ANELICH, called as a witness on behalf of the plaintiff, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Wallace:

Q. State your name, Miss Anelich.

A. Romelda Anelich.

Q. Where do you reside, Miss Anelich?

A. Everett.

Q. And you live with your mother?

A. Yes.

Q. The plaintiff in this case?

A. Yes, sir.

Q. Mario Anelich was your father?

A. Yes, sir.

Q. Did you see him sometime in August?

A. Yes.

Q. At the Marine Hospital in Seattle?

A. Yes.

Q. State whether or not he complained of pain and suffering?

A. Yes.

Mr. Pierce: Same objection that was made yesterday. I assume it will be the same ruling.

The Court: It will be overruled.

Q. You say he did complain of suffering?

A. Yes, he suffered.

Q. What was your father's business or occupation, Miss Anelich?

[fol. 172] A. He was a fisherman.

Q. Did you know about his earning capacity from fishing and working?

A. I took care of most of his things for the last four years.

Q. And how much was he earning on an average per month the last four or five years?

Mr. Pierce: I object upon the ground the witness has not shown any knowledge; the statement she took care of his things, I don't understand would show any knowledge of his income.

Mr. Wallace: Just sit down, Pierce, and I will go a little farther into it.

Q. You say you took care of his things. What do you mean, Miss Anelich?

A. I had to write all his letters and do all the figuring for him.

Q. Figuring about what?

A. About what he earned and what he had to pay off his men when he had his own boat.

Q. And were you familiar with the amount of money that he earned?

A. Yes.

Q. You knew about it?

A. Yes.

Q. As it came in from time to time?

A. Yes.

Q. Now, state as nearly as you can approximately what his monthly income would be, an average for a period of years back.

[fol. 173] A. $150 to $200.00 a month.

Q. Outside of the fishing season what occupation did he follow, if any?

A. Well, he worked in saw mills, and then he worked for the dredger and for the Fishermen's Packing Corporation.

Q. Where did he work in the saw mills, Miss Anelich?

A. In Eatonville, Washington.

Q. Do you know what he got per day there?

A. Yes, four to five dollars a day, on contract work.

Q. When he was employed at other places what wages did he get?

A. Well, during the work on the dredger it was three dollars a day.

Q. State whether or not he made more money when he was fishing?

A. Oh, yes.
Q. Did he own a boat, a fishing vessel?
A. Yes, he did.
Q. What was the name of that?
A. Tattoosh.
Q. And state whether or not he owned a troller?
A. Yes.
Q. A small boat?
A. Yes.
Q. Did he fish with that?
A. No, sir.
Q. Were you familiar with the condition of health of your father?
A. Yes, sir.
Q. What condition was his health?
[fol. 174] A. He was in the best of health.
Q. And how about your mother?
A. She was, too.
Q. And how about yourself, Miss Anelich, were you in good health?
A. Oh, yes, you can see that for yourself.
Q. In August, 1933?
A. Yes.
Q. After your father got hurt on this vessel, Miss Anelich, did you make any effort to find out about how the accident happened?
A. Yes, sir, I made every effort.
Q. Just tell the jury what effort you did make to find out?

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial.

Mr. Wallace: I think it is quite relevant, if the Court please. This is in the nature of an admiralty case; while this is not an admiralty court it is a part of the general maritime law, and here is a seaman at sea who must depend,—the plaintiff in this case must depend upon the information that she may pick up from physical facts that she was able to get hold of, or from testimony from members of the crew. I don't know how frank they will be when it comes to making their proof in this case. They certainly have the facts. I want to show what effort she has made to get all the proof that could possibly be gotten

to bring here before the jury. That is its bearing upon the issues in the case.

The Court: I do not think it is relevant or material what efforts she made. If she made discovery of facts, or learned [fol. 175] facts that she is competent to testify to she, of course, may give that testimony.

Q. Miss Anelich, did you talk to Mr. Mardesich?

A. Yes.

Q. Just tell the jury when, and where, and who was present at the time you talked to him?

A. Well, it was the third day after my dad got hurt, it was the third of August, and Mr. Mardesich and Mrs. Mardesich and my mother were present.

Q. Where were you?

A. At our home.

Q. Just state to the jury now what Mr. Mardesich said to you at that time, or to your mother as to how the accident happened?

A. Well, he said that during that morning when they had made about four sets they had quite a bit of trouble and at the time that my dad's foot caught in the rope up against the winch, that they had that same trouble that morning; he said if it wasn't for my dad it would have been his son; his son would have been caught in the winch instead of my dad.

Q. Now, did Mr. Mardesich tell you at that time where he was when the thing happened?

A. Yes.

Q. Where did he say?

A. He was in the pilot house.

Q. Did he say anything about where the engineer was?

A. He said that everyone of his men were on deck.

Q. And did he say anything about where the engineer went at the time when your father was caught with this line?

[fol. 176] A. Well, he jumped down and shut the engine off.

Q. Is that what Mr. Mardesich told you?

A. Yes, sir.

Q. I will ask you, Miss Anelich, if you went on the vessel shortly after she came in at that time? Did you go on the "Arizona"?

A. No, sir.

Q. Well, after the accident were you on the "Arizona" at any time?

A. Oh, yes.

Q. About when did you go on the "Arizona?

A. Oh, it was about two months after.

Q. I am showing you Plaintiff's Exhibit "A" and I will ask you if at the time you were on that vessel "Arizona" if you saw the stick attached to the bit on the winch that is now shown by that picture on the release bar that operates the clutch?

A. I did not see it until yesterday.

Q. Oh, you didn't see it until yesterday?

A. No.

Q. I thought you had. You didn't look,——

Mr. Pierce (interposing): Just a minute. She said she didn't see it.

Mr. Wallace: That is all right. Well, that is all.

Cross-examination.

By Mr. Pierce:

Q. Did they tell you what time this accident occurred? [fol. 177] A. Yes; around eight thirty in the morning.

Q. You say that Tony Mardesich told you that they had put in four sets before that that morning?

A. Yes, sir.

Q. Four sets before eight thirty in the morning?

A. Yes, sir.

Q. You kept the books for your father, you said?

A. I didn't keep the books.

Q. Have you got any memorandum now, or anything?

A. No, I throwed them all away just the other day.

Q. You threw them all away just the other day?

A. I can get most of them; I still got a book and if you wish I can bring it.

Q. Does it show his earnings?

A. Yes.

Q. Have you got that book?

A. Yes.

Q. All right. Do you recall what his book shows? What did he earn in the fall of '32 and the spring of '33 after he came in from the fishing season, per month? Let's put it that way. When did he quit the fishing season in '32?

A. '32 he fished for himself; in October.

Q. When did he go to work for somebody, and who did he go to work for?

A. That was for the Padilla Oyster Company.

Q. And how long did he work for them?

A. He worked, it was at least three months,—the same as I did.

Q. And what did he make?

[fol. 178] A. Well, he made four dollars a day.

Q. Worked every day?

A. Yes; well, when they had oysters.

Q. What?

A. When they had oysters.

Q. Yes, I know; but did they always have oysters?

A. No. Well,——

Q. No. Well, I am trying to figure out what they actually made that month.

Mr. Wallace: She didn't say "no"; she said "well".

Q. You mean that he worked every day, or only every day they had oysters?

A. Every day they had oysters.

Q. And would that mean every day in the week, or just once in awhile?

A. Four or five days a week.

Q. And that lasted three months. And where did he work after that?

A. Then he started fishing again.

Q. Started fishing again?

A. Yes.

Q. On what boat?

A. Then he went on the "Arizona".

Q. Then the only work he did from the end of the fishing season in '32 until he went to work on the "Arizona" in '33 was the work he did at the Padilla Oyster Company?

A. He worked before Mr. Mardesich came to call him to go to work on his boat,—he worked for Mr. Durham.

Q. Who is Mr. Durham? What does he do?

[fol. 179] A. He has that marine ways down here, the Everett Marine Ways.

Q. How long did he work for Mr. Durham?

A. Oh, I'd say about a month.

Q. How much did he make then between the end of the fishing season in '32 and the time he went to work for Mr. Mardesich in '33?

A. I think it was between forty and fifty cents an hour; that makes between three and four dollars a day.

Q. Can you give us the total? You kept the books?

A. Not of those; just the fishing trips.

Q. You cannot tell us how much he made then during the off-fishing season in '32?

A. Yes, the fishing season.

Q. I said when he was not fishing.

A. Those things didn't make much difference to me; those were my mother's.

Q. They didn't make much difference to you. What did he make in the fishing season of '32?

A. Seven hundred dollars.

Q. And how many months had he been out on the boat?

A. Well, that doubled him because he worked for the Atlas Packing Company, so it doubled his, and that was from May to October.

Q. I didn't understand you. You say it "doubled him"?

A. Yes.

Q. Did he make three hundred and fifty or seven hundred dollars, or fourteen hundred,—which?

A. Fourteen hundred.

Q. Your mother was under the impression it was seven hundred.

[fol. 180] A. Seven hundred, but he was captain of the boat so it doubled his.

Q. Did he get the money?

A. Yes.

Q. Did he get fourteen hundred dollars?

A. Yes.

Q. Then your mother is in error if she says seven hundred; when she got the check it was seven hundred? Do you think she is wrong about that?

A. It is seven hundred but she didn't double it because of his being captain of the boat.

Q. Regardless of whether he is captain, did he get seven hundred or fourteen hundred?

A. All right, let's say seven hundred.

Q. Well, which is it?

A. Seven hundred dollars.

Q. Do you know what he made for the fishing season of '31?

A. He made the same thing.

Q. Seven hundred dollars?

A. Yes.

Q. Do you know what he made after the fishing season, during the fall of '31 and the spring of '32?

A. No, I don't.

Q. Do you know what he made during the fishing season of '33 as his share?

A. Yes; he made four hundred dollars.

Q. That was his share of this season that he was on at the time that he was hurt?

A. Yes.

Q. And he had been working between what dates?

[fol. 181] A. Well, just about a month.

Q. But they paid him for his share of the entire catch of the season, didn't they?

A. Yes.

Q. Now, you worked too?

A. Yes.

Q. And your mother worked too?

A. Yes, but not now.

Q. How long were your family in '33, and before this accident occurred, on the local relief?

Mr. Wallace: Just a minute, if the Court please; we object to it as incompetent, irrelevant and immaterial. It has no bearing. It is positively held by the courts that you cannot show condition of necessity or want of either party.

Mr. Pierce: I am not endeavoring to show it. I am endeavoring to show its bearing upon the earning capacity of this deceased man; if he was making the earnings that he made he would not have been on relief, or if he was on relief and making those earnings he should not have been on relief.

Mr. Wallace: We object to it as not proper cross examination. If they want to call her as a witness let them call her. It is not proper cross examination.

Mr. Pierce: I called her as a witness to prove this man's earning capacity, and she said she had his books.

The Court: It will be overruled. I think it is proper cross examination of a witness who has testified to the claimed loss of pecuniary aid.

[fol. 182] Q. Do you recall?

A. Yes. We had to be on the relief because during that time we owed Mr. Barcot some money, the rest of the payment for the Tattoosh, and we had to pay that, and when that was earned it went to pay Mr. Barcot so we had to go on the relief.

Q. How long were you on the relief?

A. I don't think only about two months.

Q. As a matter of fact, the Tattoosh had been sold some considerable period of time before that.

A. No, sir.

Q. Mardesich bought the Tattoosh?

A. About a month before.

Q. Mr. Mardesich bought the Tattoosh, didn't he?

A. Yes.

Mr. Pierce: That is all.

Redirect examination.

By Mr. Wallace:

Q. Do you know how much money your father put into the "Tattoosh"?

A. Nineteen thousand dollars.

Q. And he lost that when?

A. About a month before he died.

Mr. Wallace: That is all.

Mr. Pierce: That is all.

(Witness excused.)

[fol. 183] Armin Morgan, called as a witness on behalf of the plaintiff, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Wallace:

Q. Mr. Morgan, what is your business or occupation?

A. Life insurance agent.

Q. Where do you reside, Mr. Morgan?

A. In Everett.

Q. How long have you been engaged in the life insurance business?

A. Approximately four years.

Q. Are you familiar with the American Mortuary Tables, Experience of Mortality Tables?

A. Yes, I am.

Mr. Pierce: I understand the rule to be, Mr. Wallace, they are admissible and I have agreed that you can show expectancy of twenty-five point something.

Mr. Wallace: Twenty-five years.

Mr. Pierce: I have not checked it. I will take your word for it.

A. 25.27 at age forty-four.

Q. And at age forty-four, assuming a man to be of that age, an insurable risk in normal good health desiring to buy an annuity of a hundred dollars annually, what would it cost?

A. May I use a reference?

Q. Yes.

[fol. 184] A. $1556.47. There is a little variation with some companies, but very little, to purchase a hundred dollars a year for life.

Mr. Wallace: That is all.

Cross-examination.

By Mr. Pierce:

Q. Those Mortality Tables are based upon the experience of the life insurance companies with reference to a healthy man, are they not?

A. American Experience Tables of Mortality was based upon the actual lives of a hundred thousand people, carried through from age ten to death.

Q. Each one of them having taken a medical examination and been pronounced in sound health prior to the time that the figures were started?

A. I don't know that. That is quite a long time ago that was formed.

Q. But in figuring it on life insurance you do require a very strict medical examination?

A. For life insurance, yes, but might I say this? An annuity is an entirely different thing. An examination is never required to purchase an annuity.

Q. Is there any difference so far as an annuity is concerned as to the occupation in which he may be engaged?

A. None whatever.

Q. A man engaged in an extremely hazardous occupation may obtain it the same as one engaged in an ordinary occupation?

A. Certainly; yes, sir. They are not dealing with life. [fol. 185] If I might extend that a little bit—they are dealing with death. In fact, the hazardous occupation is a better risk for annuities because they pay until a man passes away, at which time annuities cease.

Q. Do you pay that to a man or to the widow? You pay it to the widow during her lifetime, don't you?

A. No. An annuity is on the life of one individual, and it is paid to him until he passes away, at which time he is through.

Q. Do you know whether there is any variation on the mortality tables as to the hazardous occupations, or is that the average over all occupations?

A. I believe that is an average of the nation.

Q. What company are you in?

A. Northern Life Insurance Company of Seattle.

Q. Do you take fisherman, do you know, for ordinary life insurance?

A. Yes, sir.

Mr. Pierce: I think that is all.

Mr. Wallace: That is all.

(Witness excused.)

Mr. Wallace: I want to recall Mr. Lincoln for a question or two.

[fol. 186] ALFRED LINCOLN, recalled for further examination on behalf of the plaintiff, having been sworn, was examined and testified as follows:

Direct examination.

By Mr. Wallace:

Q. Mr. Lincoln, showing you Plaintiff's Exhibit "B" I will ask you to give us the distance on that clutch length-

wise that it was worn. You only gave one distance before.

A. Yes.

Q. If you will give the two distances now.

A. The depth is three quarters of an inch that it is worn, on the length it is an inch and a half.

Q. Now, you have had a little sketch, or a little model of a square jaw clutch made. Will you produce it? (Witness handing model to counsel.)

Q. What is this, Mr. Lincoln?

A. This is just a little model of a square jaw clutch, used on a boat; it is made out of bamboo. It is not to scale in any shape or form.

Q. Is it a fair representation of the clutch on the "Arizona" Mr. Lincoln? I don't mean as to worn parts, but as to the mechanism of the clutch.

A. It is a fair representation of a square jaw clutch; some call it a coupling; it is a fair representation of a square jaw clutch when it would be as new, not showing any wear.

Mr. Wallace: I will ask this be marked for identification. (Having exhibit marked.)

[fol. 187] Q. Now, Mr. Lincoln, showing you Plaintiff's Exhibit "H", I wish you would please take your pencil, or ink perhaps, would be better if you have ink, and mark as nearly as you can showing how the clutch on the "Arizona" which operates the winch on the deck was worn as you saw it, Mr. Lincoln, on yesterday and last Saturday.

A. It is worn on the drive side. On the measure of the impression it showed an inch and a half of the depth of the clutch, being three quarters of an inch; then on the length, an inch and a half, so it would be worn like this (marking on exhibit). Now, that is on each jaw, on the drive side jaw.

Mr. Wallace: We offer this in evidence.

Mr. Pierce: As illustrative of his testimony?

Mr. Wallace: Yes.

Mr. Pierce: I have no*t* objection to that as illustrative of his testimony, but it is not exact.

The Witness: It is not exact, Mr. Pierce. It is just demonstrative.

(Whereupon model of clutch referred to was received in evidence and marked Plaintiff's Exhibit "H".)

Mr. Wallace: I would like to pass it to the jury while the ink is there because I don't think the ink is going to stay on that heavy bamboo surface long. (Passing exhibit to jury.)

Q. Mr. Lincoln, are you familiar with the use to which levers are used near winches as you see in this picture, referring to Plaintiff's Exhibit "A"?

Mr. Pierce: I object to it unless it is restricted to fishing boats, may it please the Court; it is running far afield. [fol. 188] What you might use it for on a contracting job might be entirely different.

Mr. Wallace: The same thing exactly, and the same purpose.

The Court: Overrule the objection.

Mr. Pierce: "Purpose" and "use" are two different terms, may it please the Court.

Q. Do you know what the purpose is, Mr. Lincoln, for having a lever adjacent to the winch?

A. Yes.

Q. What is it?

A. The purpose of the lever is to engage and disengage a clutch, and the clutches or couplers used on a marine boat, are of universal use; it is not a patent for marine work only; it is a standard clutch which is used on donkey engines, elevators, caterpillars, and used in all kinds of machinery—just exactly the same kind of clutch, only maybe a difference in size.

Mr. Wallace: I think I have qualified him, Mr. Pierce. I will state this question and you can object if you think I have not.

Q. In your opinion, Mr. Lincoln, would that clutch without some assistance from some other source stay enmeshed when the load is applied?

A. I don't think—it may on occasions, but it would be too great a risk.

Q. And why wouldn't it stay in, if it would not?

A. Because if it's worn it will climb out.

Mr. Wallace: That is all.

[fol. 189] Cross-examination.

By Mr. Pierce:

Q. You don't know that it ever did climb out?
A. Not this particular one.
Q. And you won't put your judgment against the testimony of men that used the clutch day in and day out, would you?
A. Mr. Pierce, that is a foolish statement in this respect: I have had twenty years experience with clutches, and in general practical experience we know that a worn clutch is a great risk. That is why in charge of the work which I have had we are always checking workmen where they make a make-shift proposition for the time being and we try to correct that.
Q. Do you know that this clutch was used throughout the fishing season of 1933 and '34, and the testimony of the men who worked on the winch will be that it never slipped out?
A. I don't know of my own personal knowledge.
Q. That wouldn't change your opinion on it any?
A. No.
Q. Even if somebody swore that it never had slipped out?
A. I then would doubt their word very much.
Q. You would doubt their word and take your guess?
A. I would doubt their word very much.

Mr. Pierce: That is all.
Mr. Wallace: That is all.

(Witness excused.)

[fol. 190] Mr. Wallace: We have some depositions we would like to have published, may it please the Court. At this time we ask that the depositions be opened and published.

Mr. Pierce: No objection.

Mr. Zundel: We will ask that the stipulation for the taking of it be filed, if the Court please, at this time. It is just in the files separate, I think.

(Having deposition published.)

[fol. 191] IN SUPERIOR COURT OF SNOHOMISH COUNTY

[Title omitted]

STIPULATION

It is hereby stipulated and agreed by and between counsel for the above named plaintiff and defendants, that the depositions of Dr. K. H. Sturdevant and J. K. McKenzie may be taken at Friday Harbor, before S. R. Buck, at his office in Friday Harbor, Washington, on the 27th day of August, 1934.

Dated August 20th, 1934.

(Signed) Chas. A. Wallace, Attorney for Plaintiff.
(Signed) Ralph S. Pierce, (Signed) Edwin J. Cummins, Attorney- for Defendants.

[fol. 192] [Title omitted]

DEPOSITION OF DR. K. H. STURDEVANT AND W. B. MCKENZIE

Be it remembered, That pursuant to the stipulation hereunto annexed, and on the 27th day of August, 1934, at Friday Harbor, in the County of San Juan, State of Washington, before me, S. R. Buck, a Notary Public in and for the said County of San Juan, personally appeared Dr. K. H. Sturdevant and W. B. McKenzie, witnesses, produced on behalf of plaintiff in the above entitled action, now pending in the said court, who being first by me duly sworn, were then and there examined and interrogated by Chas. A. Wallace, counsel for said plaintiff, and by Edwin J. Cummins, counsel for said defendants, and testified as follows:

DR. K. H. STURDEVANT, being first duly sworn, on oath testified as follows:

Direct examination.

By Chas. A. Wallace:

"Q. Will you please state your name, Dr.?
"A. Kenneth H. Sturdevant.
[fol. 193] "Q. Where do you reside?
"A. Friday Harbor.

"Q. How long have you resided here?
"A. About three years.
"Q. What is your business or occupation?
"A. Physician and surgeon.
"Q. Are you a graduate from a medical institution?
"A. Yes, the College of Medical Evangelists.
"Q. Where is that located?
"A. At Loma Linda, California.
"Q. Are you licensed to practice medicine and surgery in the State of Washington?
"A. I am.
"Q And were you such licensed and practising surgeon and physician on August 1, 1933, at Friday Harbor, Washington?
"A. I was.
"Q. Did you have occasion to treat Mario Anelich on that day?
"A. I did.
"Q. Just describe to the court, Doctor, what condition you found him in at your first visit.
"A. You mean the first time I saw the man?
"Q. Yes, the first time you saw the man.
"A. I first saw the man on board a Seine Boat, the name of which I do not remember. It was not the "Arizona," however. He was lying on the deck, covered with some blankets. I removed the blankets, found a tourniquet on his thigh outside his clothes. I split open a trouser leg below the knee, and found the injury to be to the knee and lower leg. The muscles and skin of the entire outside of the knee and the upper one-third of his lower leg were [fol. 194] badly torn. The bone was fractured in several places. It had been bleeding very freely, and still was bleeding a little.
"Q. That is the way you found him?
"A. Yes.
"Q: Describe to the court, Doctor, this tourniquet that you mentioned.
"A. The tourniquet was a rope about three eighths of an inch, I guess, in diameter, applied in regular fashion, knotted around the thigh, with a stick in it twisted to tie it.
"Q. Did that foot that was injured have any boot on it?
"A. I do not recall.
"Q. Tell the court now what you did.

"A. I took the man in an ambulance to my office, gave him a quarter grain of Morphine Sulphate hypodermically. I removed the tourniquet, which allowed the wound to bleed very copiously and then reapplied the tourniquet. I then cut away all the muscles and skin that were too badly damaged to save. It wasn't much, and sewed these muscles back in place. I used five per cent mercurochrome very freely throughout the operation as an antiseptic, probably about two ounces of it. I then sewed the skin over, put a dressing on the leg to help stop the bleeding, gave him another quarter grain of Morphine. Then the tourniquet was removed. Do you think that covers it?

"Q. Did you re-place the tourniquet?

"A. I replaced the tourniquet during the operation and removed it when finished.

"Q. In your treatment of the wound, did you "clean it out," as we say in laymen language?

[fol. 195] "A. I flushed it out with mercurochrome, if that is what you mean.

"Q. Did it have any bandages on it when you first looked at it?

"A. No, not as I remember.

"Q. Did you find any dirt or foreign matter or substance?

"A. It was covered with his clothes, which were undoubtedly not clean.

"Q. As I recall it, Doctor, when I talked with you some time last year, I think it was, you mentioned some blood with oil in it.

"A. Yes, there were oily or fatty particles, probably fat from the bone marrow. It had the appearance of fat, rather than of oil. Of course, the man's clothes were dirty and oily; he had been tending a winch.

"Q. Your recollection is clear that there were no bandages on the wound?

"A. No, I recall taking or cutting the man's underwear off.

"Q. Do you recall that it had had any other application of any kind by way of temporary or first aid treatment, other than the tourniquet of which you mention?

"A. As far as I know, it had nothing.

"Q. Give us the hour, as near as you can, when you first saw him.

"A. It was about 10:30 in the morning. I didn't keep track of the exact time.

"Q. How long did you keep him in your office?

"A. He stayed in my office until about 4:30 or 5:00 in the afternoon.

"Q. Where did he go from there?

[fol. 196] "A. They took him to the Coast Guard cutter in an ambulance.

"Q. Did you have occasion to call the Coast Guard on that day?

"A. I did.

"Q. In what connection?

"A. To request a boat to take this man to Seattle.

"Q. Do you know to whom you talked?

"A. To Lt. Kinner.

"Q. Are you personally acquainted with him?

"A. I am.

"Q. Did the Coast Guard boat which took Mr. Anelich away from Friday Harbor respond or come here to Friday Harbor in response to your call?

"A. It did.

"Q. Do you recall what time it arrived in Friday Harbor?

"Mr. Cummins: I object to all this testimony of the Doctor's in respect to the Coast Guard on the ground that it is utterly immaterial and irrelevant, and has no bearing on the issues in this case."

Mr. Pierce: Now, generally, may it please the Court, we want to stand on that objection because it goes to this whole cause of action, and that is, as to what constitutes reasonable care on the part of the officers of the fishing boat in taking care of an injured seaman. That presents the question,—perhaps it can be raised better in another way at a subsequent time than to insist upon these objections now, but the theory of the objection and the theory of the other objections that run through this deposition is that bearing largely upon the question of calling airplanes and other things that there is no such duty imposed upon [fol. 197] a Master and that, therefore, it is all incompetent, irrelevant and immaterial, they having exercised ordinary care when they did what appeared to the ordinary layman under the circumstances the proper course to take.

As I recall, there are quite a number of objections all the way through here, and I do not want to have to urge them every time but I want the record to appear clear that I am not conceding that there is any duty on the Master of this vessel, or the crew of this vessel to have done anything except to exercise ordinary care as the matter was viewed by them in the circumstances existing at the time; and that ordinary care did not involve the cleaning out of a wound by a Captain of a boat who had never had any surgical experience; and ordinary care did not include sending for hydroplanes, or airplaines, and that these boys did do all that could be expected of them under the law.

I don't know just how to raise the question unless it be raised subsequently on a motion to withdraw these particular allegations of negligence, or this particular cause of action, from the jury. I want to save the record on it in any event, without interrupting the reading of this deposition.

Mr. Wallace: This is just a question of fact here.

The Court: I overrule the objection at this time.

Mr. Zundel: I might say that that question was not answered at any rate. The next question reads:

[fol. 198] "Q. (Mr. Wallace continuing:) Doctor, was Mr. Anelich suffering from septicemia?

"A. Well, that is a hard question. Probably not. It was too near following the accident for septicemia to develop. That is a question for an expert witness.

"Q. I am assuming that you are an expert witness.

"A. In my opinion he could not have been suffering from septicemia.

"Q. How long, Doctor, in your opinion, could a man be injured, as you have found him and described him here, before septicemia would set in?

"A. Am I testifying as an expert witness?

"Mr. Cummins: I object. The Doctor is merely called to tell the facts, and not as an expert witness on septicemia. He was not called as an expert to testify on this question, and is not compelled to answer this question. He is merely here to testify as to his treatment of the man.

"Mr. Geneste: The Doctor takes this position, that he is to testify as to what he did, and not as an expert."

Mr. Pierce: We are not standing on that objection.

"A. Do I have to answer the question?

"Q. (Mr. Wallace continuing:) Of course, we are only asking you for your opinion, Doctor.

"A. I am unable to say just how long following an injury septicemia would develop. As a general rule, following an accident septicemia developes between twenty-four and seventy-two hours following the injury. There must be time for multiplication of germs to take place in a wound, [fol. 199] and to invade the bloodstream.

"Q. Did you know Antone Mardesich at that time?

"A. May I ask you if he was the skipper of the boat "Arizona"?

"Q. His son was.

"A. I did not know him at that time.

"Q. Did anybody accompany Mr. Anelich to your office?

"A. No, only the man who drove the ambulance.

"Q. You do not recall the name of the vessel which brought him to Friday Harbor.

"A. No.

"Q. It was not the "Arizona"?

"A. No.

"Q. No one from the "Arizona" came with him?

"A. No, I don't know about that. There may have been someone from the "Arizona" who brought him, but none came into my office.

"Q. When you received him at the ambulance, that was right off the vessel? You saw him on the vessel, you say?

"A. Yes, I saw him on the vessel.

"Q. You removed him to your office, then removed him from your office to the Coast Guard boat?

"A. He was removed by the ambulance.

"Q. There was no one accompanying him other than the ambulance driver?

"Mr. Cummins: I object to this as immaterial and irrelevant and having no bearing whatever on the case.

"Q. (Mr. Wallace continuing:) Was there anyone? [fol. 200] "A. As I remember——

"Mr. Cummins: I move that this be stricken.

"A. The ambulance driver had someone help him. I do not know who it was.

"Q. (Mr. Wallace continuing:) Doctor, do you happen to know how far it is from here to Mitchell Bay?

"Mr. Geneste: By water or by land.

"Q. (Mr. Wallace continuing:) By land.
"A. About ten or twelve miles, I do not know exactly.
"Q. Have you driven over it?
"A. Yes.
"Q. What is the kind or character of the road?

"Mr. Cummins: I object to his answering this question. There has no showing been made that the Doctor drove over this road at the time of this accident.

"A. The road from Friday Harbor to Mitchell Bay, with the exception of about a mile, is a good, dirt and gravel surfaced road. The last mile is rutty, very winding down through the woods, and very rocky. Does that cover it?
"(Mr. Wallace continuing:) Yes, I just wanted to show that there is transportation from here to Mitchell Bay feasible for cars.

"Mr. Cummins: I want the record to show my objection to this testimony as being entirely immaterial and irrelevant and as having no bearing on the issue in question.

"Q. (Mr. Wallace continuing:) Doctor, on August 1st, 1933, was there any hospital at Friday Harbor for the care [fol. 201] or treatment of a person injured as Mr. Anelich was injured?
"A. No. May I ask you if you mean for first aid or permanent treatment?
"Q. Permanent.
"A. No.
"Q. I will ask you if you did not give to Mr. Anelich first aid treatment as best you could under the circumstances?
"A. I did.
"Q. That is all.

Cross-examination.

By Mr. Cummins:

"Q. Then Doctor, you did everything you could to prevent the infection of this wound?
"A. I did.

"Q. No other doctor treating the same kind of wound could do any more than you did?

"A. I believe not, under the circumstances.

"Q. There are no cars stationed at Mitchell Bay that you know of?

"A. There are several people who live there. I think they own cars. I do not know.

"Q. Doctor, when you sent this man on this boat, did you send a report with him of his condition, as you saw it, and your recommendations as to treatment?

[fol. 202] "A. Yes.

Redirect examination.

By Mr. Wallace:

"Q. Doctor, when did the members of the crew of the "Arizona" come to your office on that day?

"A. About 1:30, I guess, possibly a little sooner.

"Q. Do you know who they were?

"A. The only one I remember is Pete Mardesich.

"Q. This ambulance that removed Mr. Anelich from the dock at Friday Harbor to your office, and then returned him to the dock again, by whom is it operated, do you know?

"A. Harry King.

"Q. Will you describe this ambulance to the court?

"A. The ambulance is a Dodge Sedan, which has been secondarily made into an ambulance. It carries a regular ambulance stretcher.

"Q. What is its use generally on San Juan Island?

"A. Ambulance and hearse.

"Q. Does it respond to calls generally from the public?

"A. Yes.

"Q. On that day, August 1, 1933, did you call the ambulance?

"A. No.

"Q. Who called it, do you know?

"Mr. Cummins: I object to that as immaterial and irrelevant and as having no bearing whatever on the issues of the case here.

"A. There were many men at the dock. I called one of [fol. 203] them and he 'phoned for the ambulance.

"Q. (Mr. Wallace continuing:) Did the operator of the ambulance on that day have a telephone, do you know?

"A. I presume he did. He has had one continuously.

"Q. You were in the habit of calling him by 'phone when you wanted him?

"A. Yes.

"Q. I think that is all.

"Mr. Cummins: No further cross-examination.

(Signed) Kenneth H. Sturdevant, Witness.

W. B. McKenzie, being first duly sworn, on oath testified as follows:

"Mr. Wallace: Mr. Cummins, this is not the witness what was mentioned in the stipulation.

"Mr. Cummins: What is the change?

"Mr. Wallace: This is the son.

"Mr. Cummins: What is his name?

"Mr. Wallace: W. B. McKenzie. The reason for the change is that he was managing the telephone company at the time.

"Mr. Cummins: All right.

Direct Examination.

By Mr. Wallace:

"Q. State your name, Mr. McKenzie.

"A. In full?

"Q. Yes.

"A. William Bruce McKenzie.

"Q. Where do you reside?

"A. At Friday Harbor.

"Q. What is your business or occupation?

[fol. 204] "A. Merchant, at present.

"Q. What occupation were you following on August 1, 1933?

"A. The same.

"Q. Did you at that time have management of a telephone system?

"A. I did, the Inter-Island Telephone Company.

"Q. What is the extent of the connection of the inter-Island Telephone Company, or was its extent at that time?

"A. Local and long distance.

"Q. And where was your long distance connection?
"A. Bellingham.
"Q. Could you call, or one desiring to make a call from Friday Harbor or the Island of San Juan, could they make connection with Seattle?
"A. Yes.
"Q. Could they make connection with Everett?
"A. Yes.
"Q. With Victoria, B. C.?
"A. Yes.

"Mr. Cummins: I object to all of this man's testimony as being wholly incompetent, irrelevant and immaterial, and as having no bearing on the case, and if you will allow this exception to go to all of his testimony it will save my making objection to each question and answer.
"Mr. Wallace: Quite so.

"Q. (Mr. Wallace continuing:) You could make connection with Bellingham?
"A. Yes.
"Q. Also with Anacortes?
"A. Yes.
[fol. 205] "Q. What, if any, telephone station did you keep maintained at Mitchell Bay on August 1, 1933?
"A. Nothing but private phones.
"Q. Nothing but private phones. Do your records show, Mr. McKenzie, the calls that were handled on San Juan Island on August 1, 1933?
"A. Yes.
"Q. I will ask you to state whether or not there was a call from Antone Mardesich or Peter Mardesich going over your lines to a person by the name of Morris, in Everett, Washington, the number in Everett being Blue 1332?
"A. Blue 1332, Mardesich to Mardesich.
"Q. And will you give us the time?
"A. 12:33 Daylight Saving Time. That would be 11:33 Standard time. We were working on Daylight Saving Time here, but owing to the tides, the fishermen were fishing on Standard Time.
"Q. From what station did that call originate?
"A. Pay station, local office.
"Q. And where is that office located?
"A. In Friday Harbor.

"Q. That was at the office of the company?

"A. Yes.

"Q. Do you have another call that day from a pay station to Port Townsend?

"A. Yes.

"Q. And will you give us the hour?

"A. 1:55, also Daylight Saving.

"Q. And who made that call, Mr. McKenzie?

"A. No record, cash call to Coast Guard, Port Townsend.

[fol. 206] "Q. And how would that call be made? What instruments would they use?

"A. In what way do you mean?

"Q. In getting the connection, how would they get it? Would they use a coin phone?

"A. No.

"Q. Just over your counter?

"A. Yes.

"Q. You do not know who made the call?

"A. No, but our girl knows—the operator who was on duty at that time. By calling her you can get that information.

"Q. Have you any recollection about it?

"A. That will be immaterial to you.

Mr. Cummins: I object. That would be hearsay.

"A. It is hearsay. I don't want to answer it.

"Q. (Mr. Wallace (continuing:) Do you know in what connection that call was placed?

"Mr. Cummins: I object. That is hearsay.

"A. How do you mean that?

"Q. (Mr. Wallace continuing:) What was the purpose of the call, do you know?

"A. For the Coast Guard.

"Q. Did you have any other calls over your lines that day to the Coast Guard at Port Townsend?

"A. Yes.

"Q. And when was that?

"A. 2:00 P. M.

"Q. Who was that?

"A. Dr. Sturdevant.

"Q. Your records show who was called?

[fol. 207] "A. Commanding Officer, Coast Guard, Port Townsend.

"Q. Now, were there any other calls that came in over your line in connection with Mr. Anelich's injury on that day, August 1, 1933?

"A. Not to my knowledge, no.

"Q. Have you given us all the calls that were made in connection with Mr. Anelich's injury?

"A. I have.

"Q. There was no other call made to Everett?

"A. Yes.

"Q. Who made that call?

"A. Lee Mackovich.

"Q. Do you know what number he called in Everett?

"A. Main 1027.

"Q. What time?

"A. 10:40 A. M.

"Q. What did you say that number was?

"A. Main 1027.

"Q. Do you know who Lee Mackovich was?

"A. Yes.

"Q. Who was he?

"A. Fisherman of the Fishermen's Packing Corporation.

"Q. Was there any other call that day to Everett or Seattle?

"A. No.

"Q. You have no record of any other call?

"A. No.

"Q. No record?

"A. No.

"Q. Was there any call over that line by anyone else or by any persons mentioned or connected with the "Arizona", [fol. 208] in connection with Mr. Anelich's injury?

"A. I do not recall.

"Mr. Cummins: I object to the question. It has not been shown that this man was in full charge of this telephone situation on that day. I mean to be personally present when each call was put through. I submit the record shows that. Therefore, the question couldn't be answered by the witness, and answer would be entirely immaterial and hearsay. I submit that the telephone company doesn't know, nor is it supposed to know the purport of conversations going on over its lines.

"Q. (Mr. Wallace continuing:) Was there any call made over your line on August 1, 1933, in connection with Mr.

Anelich's injury by anyone connected with the "Arizona", or any other person, so far as you know, to Victoria, B. C.?

"Mr. Cummins: I object. I submit that the witness isn't qualified to testify to that because he isn't supposed to listen in on the conversations going over his lines. He couldn't possibly answer.

"A. The only way I could answer that would be to go over the entire day's records. All the calls are recorded on tags which are down in our office.

"Q. (Mr. Wallace continuing:) Would it be asking too much, Mr. McKenzie, to look and see if there were any calls to Victoria, B. C., on that day, and to Bellingham, and to Seattle? You have said there were a number.

"A. I will look over the complete day's records.

"Q. What subscriber did you have at Mitchell Bay, if any, on August 1, 1933?

[fol. 209] "A. At Mitchell Bay, right on the Bay, just one.

"Q. Just one?

"A. Just one.

"Q. Was there any call over that line in connection with Mr. Anelich to anyone connected with the Arizona?

"A. I couldn't say.

"Q. You have examined the records?

"A. There is a record from Mitchell Bay, which would be Mr. Carl Mueller's, Mardesich to Morris, Everett, 10:00 A. M.

"Q. That is the one you gave?

"A. Yes.

"Q. What is the number at Mitchell Bay?

"A. Number 253.

"Q. Number 253, and that line was connected with Everett at that time, was it?

"A. Yes.

"Q. And over that same line could that same call have gone to Victoria, B. C.?

"A. Yes.

"Q. And to Seattle, Washington?

"A. Yes.

"Q. How long would it take you, Mr. McKenzie, to run through your records to ascertain if three were any long distance calls to Bellingham, Victoria, B. C., or to Seattle, Washington, on that day?

"A. About an hour.

"Q. Mr. McKenzie, one other question; Did you have in your office on August 1, 1933, a Seattle Telephone Directory?

"A. Yes.

"Q. Was that available to the general public?

[fol. 210] "A. No.

"Q. Suppose that a member of the public wanted to inspect that Directory, would he be permitted to do so?

"A. Yes.

"Q. Upon request it would have been furnished?

"A. Yes.

"Q. Do you happen now to have that same Directory, or have you surrendered it.

"A. I believe we have turned it in. There have been two or three issues since, and I believe it has been sent back.

"Q. The one you had in your office on August 1, 1933, was the current number in use at that time?

"A. Yes.

"Q. I am trying to identify it and submit one as an exhibit at the trial.

"Mr. Cummins: I object to this. The witness hasn't independent knowledge or recollection that it was the particular current issue at that time.

"A. I did not so state.

"Q. (Mr. Wallace continuing:) But you think you had the current one at that time?

"A. We did, absolutely.

"Mr. Wallace: I think that is all, Mr. McKenzie, until you inspect your records, if you will please, for calls to Victoria, B. C., Bellingham and Seattle.

Adjournment until 8:00 P. M. (Agreed upon by all parties.)

Upon reconvening, Mr. Wallace continued his direct examination of the witness, W. B. McKenzie, as follows:

[fol. 211] "Q. Mr. McKenzie, have you brought with you the official records of the Inter-Island Telephone Company showing all the calls, long distance or by telegraph, from Friday Harbor to any place on the mainland, including Vic-

toria, B. C., Vancouver Island, Bellingham, Everett, or Seattle?

Your answer, Mr. McKenzie?

"A. Yes.

"Q. Other than the calls that we have heretofore put in the record, were there any other calls shown by your official records from anyone connected with the Purse Seine vessel "Arizona", or any call made in behalf of her, concerning the injury of Mario Anelich, on August 1, 1933, to Victoria, B. C., Bellingham, Washington, Everett, Washington or Seattle, Washington?

"Mr. Cummins: I object to the witness testifying, because he surely hasn't shown that he knows the crew of the "Arizona", their names. He is only speaking from a record of the telephone company. He was not on the phone himself, was merely the manager. The girl was in charge; she is the one to testify, if anyone. I submit that his testimony is wholly incompetent, irrelevant and immaterial, and should not be offered as the best and only evidence for the reason that it is positively a violation for any phone system to listen in on any calls. Therefore, all these records can show is from station to station.

"A. I didn't make this record.

"Q. (Mr. Wallace continuing): You may answer, Mr. McKenzie, if there were any other calls.

"A. To my knowledge, no.

"Q. What is the regulation of the Inter-Island Telephone [fol. 212] Company as to the keeping a record of calls. What is required, Mr. McKenzie?

"A. Regular tickets.

"Q. Such as you have in your hands?

"A. Such as I have here.

"Q. And is there any other telephone or telegraph exchange from Friday Harbor or San Juan Island to the mainland, or to any of these stations I have mentioned?

"A. No.

"Q. And was not on the day in question, August 1, 1933?

"A. No.

"Q. You were the General Manager of the Inter-Island Telephone Company at that time?

"A. Yes.

"Q. And all the records were made under your supervision or control?

"A. Yes.

"Q. Under your direction, and these are official records of the company?

"A. Yes.

"Mr. Wallace: We now desire to state to counsel for the defendant that the witness now on the stand has produced and brought here to court what is the memorandum of the official record of every telephone call made long distance to any of the points I have mentioned on August 1, 1933, and counsel may examine them and put in any evidence he may desire.

"Mr. Cummins: I submit that this witness cannot testify to these records. He did not make these records.

[fol. 213] Cross-examination.

By Mr. Cummins:

"Q. Whose handwriting is on these records?

"A. We have two operators.

"Q. What are their names?

"A. You can tell by the writing which is which. One is Marguerite Gross, and other Mrs. M. C. Weir.

"Q. You were not with them when they made the record? They make the record independently of you and your personal supervision, do they?

"A. Yes.

"Q. And you merely act as a communications agent for outside calls, isn't that a fact? You are the agent of the Bell Telephone, or what is the connecting unit?

"A. Pacific Telephone and Telegraph. We are considered a connecting company.

"Q. A connecting company? Do you ever personally check the records, or audit these tags?

"A. Yes, we audit the long distance calls. The bookkeeper does.

"Q. But you do not do it personally?

"A. I have done it.

"Q. But you did not on August 1, 1933?

"A. No.

"Mr. Cummins: I submit that the witness is unqualified to identify these records or to say that they are correct, that the girl can put through a call to the mainland, and unless it is checked when the monthly list comes back, that is your only notification that a call has been put in.

"Mr. Wallace: I object on the ground that it is imma-
[fol. 214] terial, and calling for a conclusion that it is not possible that something might be possible. I submit that anything might be possible.

"Q. (Mr. Cummins continuing:) Well, put it this way; Long distance calls can go from Friday Harbor to the mainland and unless you audit the account as it comes monthly, (You get a commission on them, don't you?) you cannot ascertain the correctness of your records unless you audit the account?

"A. It is correct each time. Bellingham is the clock station. The time on the conversation is never started until the two parties are connected. There is a double check-up.

"Q. Where are these cards left?

"A. On file.

"Q. In the office?

"A. In our office, yes.

"Q. You have had cards misplaced and lost?

"A. At the end of a year's time we destroy them entirely. To my knowledge a card has never been lost.

"Mr. Cummins: I still don't think Mr. McKenzie is the man to testify because of the fact that the best evidence is to be given by the people who made the records, and who are available to testify.

Redirect examination.

By Mr. Wallace:

"Q. Mr. McKenzie, these are the official records of your company upon which your charges for the service is based?

"A. Yes.

"Q. And if there was any discrepancy as to the number of calls it would have been ascertained and corrected by the
[fol. 215] connecting system, would it not?

"A. Yes.

"Q. You have no record of any alterations or changes or additional calls for that day?

"A. No.

"Q. I do not know whether I asked you this question or not: Did you have any call at all on that day, August 1, 1933, from Friday Harbor to Victoria, B. C.?

"A. We have no record of any such call.

"Mr. Wallace: That is all, Mr. Cummins.

Recross-examination.

By Mr. Cummins:

"Q. Mr. McKenzie, on August 1, 1933, you didn't know the individual names of the members of the crew of the "Arizona."

"A. Only one.

"Q. Only one of the crew. Therefore, when you consult your records on the outgoing calls from Friday Harbor on that particular day, aside from the business that you know, there are a number of calls there, are there not, that you cannot identify?

"A. Yes.

"Mr. Wallace: Mr. McKenzie, will you take your calls out that you cannot identify, and read them into the record?

"A. Read them as they are?

"Q. (Mr. Wallace continuing:) Yes.

"A. Sutherland to Garfield 0123-Seattle, W. & S. Eugent. Mrs. A. S. Joy, from 420, to Seattle,-Vermont 3829—That call was never put through. That is, they didn't reach the party.

Pay station to East 1514-Seattle.

[fol. 216] 333-Ammons to Prospect 9016-Seattle. Cancel call.

"Q. Was that call ever completed?

"A. No, it was cancelled. Mitchell-253, to Main 186-Randall, at Everett. That is Mitchell Bay number 253-Fish Camp.

"Q. Now, the other calls that were made on that day, can you identify them? Have you done so?

"A. Yes.

"Q. They were not in connection with the "ARIZONA" or Mr. Anelich?

"A. No.

"Mr. Cummins: How can you testify to that, Mr. McKenzie? You didn't listen to the calls, did you?

"A. No.

"Q. (Mr. Cummins continuing:) You draw that conclusion from the parties calling and from the parties called, not from listening to the conversation or talking to the parties about it?

"A. No.

"Q. How many calls long distance did you have that day, Mr. McKenzie? I mean to any of these stations we have mentioned on the mainland, or to Victoria, B. C.?

"A. Thirty-four.

"Mr. Wallace: while we do not desire to have them in evidence now, I ask counsel if he desires to do so, if he expects to connect them up in any way with the "Arizona," or in any way having anything to do with aiding or assisting or getting treatment for or relief to Mario Anelich?

"Mr. Cummins: Counsel doesn't see fit at this time to examine into each one of these calls to discover if they came [fol. 217] from the "Arizona" or not, but the mere asking of that question and putting it to counsel in no way precludes counsel in his own time from making his own proof in that regard.

"Mr. Wallace: I think that is all, Mr. McKenzie.

(Concluded at 8:15 P. M., August 27, 1934.)

(Signed) Wm. Bruce McKenzie, Witness.

STATE OF WASHINGTON,
County of San Juan, ss:

"I, Sam R. Buck, a Notary Public in and for the State of Washington, County of San Juan, do hereby certify that the above depositions were taken before me, and reduced to writing, at Friday Harbor, in said County, on the 27th day of August, 1934, at 6:00 P. M., in pursuance of notice hereto annexed; that the above named witnesses before examination were sworn to testify the truth, the whole truth, and nothing but the truth, and that the said deposition was carefully read by said witnesses and then subscribed by them.

Dated at Friday Harbor, Washington, this 30th day of August, A. D., 1934.

(Signed) Sam R. Buck, Notary Public in and for the State of Washington, residing at Friday Harbor." (Seal.)

Mr. Zundel: We ask to have these depositions published.

(Having depositions published.)

[fol. 218] [Title omitted]

"Be it remembered, that on the 6th day of November, 1934, pursuant to Stipulations hereto annexed, before W. J.

Lauckhart, Notary Public, personally appeared the following witnesses at the time and place as hereafter stated."

"Dr. W. C. Teufel at the hour of 3: o'clock, P. M., at the U. S. Marine Hospital, Seattle, King County, Washington."

"Dr. R. Laige at the hour of 4: o'clock, P. M., at the U. S. Marine Hospital, Seattle, King County, Washington."

"Ronald C. Kinsey at the hour of 4:30 o'clock, P. M., in the office of the Gorst Air Transport, Incorporated, in their hangar stationed on the south end of Lake Union."

"Messrs. Chas. A. Wallace, Esq., and Wilbur Zundel, Esq., appearing as attorneys and counsel for and on behalf of the plaintiff:"

"Mr. Ralph S. Pierce, Esq., appearing as attorney and counsel for and on behalf of the defendants."

"The witnesses having been first duly sworn, and being examined by counsel for plaintiff and the defendants, deposed and said as hereinafter set out, to-wit:"

[fol. 219] IN SUPERIOR COURT OF SNOHOMISH COUNTY

[Title omitted]

STIPULATION TO TAKE THE DEPOSITION OF RONALD KINSEY

It is hereby stipulated that the deposition of Ronald Kinsey, a witness on behalf of Plaintiff, may be taken before George Mathieu, a Notary Public, or any other Notary Public available at said time at Room 611 Alaska Building, Seattle, Washington, on November 6th, 1934, at 2:00 o'clock P. M. of said day.

(Signed) Chas. A. Wallace, Attorney for Plaintiff.
(Signed) Ralph S. Pierce, Attorney for Defendants.

[fol. 220] IN SUPERIOR COURT OF SNOHOMISH COUNTY

[Title omitted]

STIPULATION

It is hereby stipulated and agreed that the deposition of Dr. L. E. Hooper and Dr. Laige, witnesses on behalf of Plaintiff, may be taken at the Marine Hospital in the City

of Seattle, Washington, before J. W. Lockhart, a Notary Public, or some other Notary Public, on November 6th, 1934, at the hour of 3:00 o'clock P. M. of said day.

(Signed) Chas. A. Wallace, Attorney for Plaintiff.
(Signed) Ralph S. Pierce, Attorneys for Defendants.

[fol. 221] "DR. W. C. TEUFEL, called as a witness on behalf of the plaintiffs, after being first duly sworn, was examined and testified as follows:"

Direct examination.

By Mr. Wallace:

"Q. State your name.
"A. W. C. Teufel.
"Q. And where do you reside?
"A. United States Marine Hospital, Seattle.
"Q. What is your business, occupation or profession?
"A. I am a physician.

"Mr. Pierce: We will admit the Doctor's qualifications.

"Q. Very well. And where are you employed now or engaged in your profession?
"A. At the United States Marine Hospital, Seattle.
"Q. Now, how long have you been engaged there?
"A. I have been at this hospital since the 1st of February, 1933, when it was opened.
"Q. On or about August 1st, 1933, did you have a patient by the name of Mario Anelich in the Marine Hospital?
"A. I did.
"Q. In what capacity were you employed in the Marine Hospital on that day, Doctor?
"A. I am Chief Surgeon.
"Q. What time in the day did you receive that patient, Mr. Anelich?
"A. The records show that this man was received at the hospital 10:45 P. M. on the 1st day of August, 1933.
"Q. And how long after that did you see him?
"A. I saw the man the next morning, nine o'clock.
[fol. 222] "Q. Where was he at that time?
"A. He was in the—he was in the surgical ward.
"Q. And for what purpose had he been taken there?

"A. For treatment of an injured leg.

"Q. Will you describe that injury somewhat in detail, Doctor?

"A. At the time I examined him he was found to be suffering from a compound fracture of the left leg. By "leg" I mean below the knee. Such fracture was shown by X-ray to consist of a comminuted fracture of the tibia extending up to the knee joint with extensive laceration of the soft parts of the leg and the posterior surface. The wound had been closed with sutures. There was extensive laceration of the soft tissues, evidence of marked swelling and edema.

"Q. At what hour did you see him on the morning of the second?

"A. Well, immediately when I came to the hospital at nine o'clock.

"Q. Describe the extent of this wound—the size of it—if you will, Doctor.

"A. Well, the wound apparently was about six, eight inches long on the posterior medial surface of the leg from about the level of the—or just above the level of the knee joint extending downward, and the wound of course extended down to the bone and the fragments of the bone were exposed.

"Q. And were the arteries torn or broken?

"A. Apparently the arteries were torn. The main blood supply however was not interfered with. Evidently large arteries were torn because the man bled considerable and [fol. 223] when we opened the wounds secondarily there was considerable hemorrhage again—when we took the stitches out.

"Q. Would that indicate that the arteries had been "tied up" to use a layman's expression, or had they not?

"A. The bleeding had been stopped by suture.

"Q. By that you mean just sewing up the wound?

"A. Sewing up the wound; yes, sir.

"Q. What about the ends of the arteries? Had they been——

"A. (Interposing.) Of course the arteries, unless they were main arteries—it would hardly have been possible for a doctor to catch them unless he had him under an anesthetic. In a case like that the routine treatment is by pressure to stop the bleeding.

"Q. Did you open up the wound at that time?

"A. Yes; we opened up the wound.

"Q. And what did you do then?

"A. We attempted to set the leg by putting steel pins through the upper fragment of bone and the lower fragment and pulling the things into alignment. These pins however were not inserted through the original injury but through other holes.

"Q. That you made by cutting in?

"A. Well, yes; by just making a little hole in the skin and pushing the pin through the bone. In that way you get sufficient traction to overcome this kind of a fracture.

"Q. He was under the anesthetic at that time?

"A. Yes; let's see; (consulting notes) he had a nitrous oxide ether.

"Q. Was there an infection at that time?

[fol. 224] "A. Well, we were unable to tell that at that time.

"Q. The leg had a tourniquet on it, did it not, above the knee when he arrived here?

"A. No.

"Q. Didn't have?

"A. No.

"Q. Did any other doctor assist you at that time?

"A. Dr. Laige.

"Q. After setting the bone what was done?

"A. Well, of course the pins were incorporated in plaster cast and then the man was put back to bed. The wound was dressed.

"Q. How often did you see him after that date, the 2nd of August, 1933?

"A. Oh, I saw him numerous times each day.

"Q. And on the 3rd of August what was his condition?

"A. Why, he showed evidence of a generalized infection as evidenced by delirium, high fever, rapid pulse.

"Q. And did you make blood tests?

"At the time? Let's see; (examining notes) I don't think blood tests were made. At that time the hospital,—we hadn't our laboratory completed at that time. We were not equipped to do a delicate blood work. As far as we could tell he had typical symptoms of systemic infection.

"Q. What is septicemia, doctor?

"A. Septicemia is the presence and propagation of the bacteria in the blood stream.

"Q. And where do those come from? How do they get into it?

"A. They usually come from an external wound.

[fol. 225] "Q. What is meant by "secondary infection"?

"A. Secondary infection? I would say secondary infection is when you have a clean wound and the offending organisms are introduced secondarily, not at the time of the original injury, the operation.

"Q. In a wound of this nature as you have described it here is there danger of secondary infection?

"A. Yes; there is. Of course that would all depend on the way the wound was treated secondarily. There is always danger.

"Q. And they come from outside sources?

"A. Yes.

"Q. What in your opinion would you say the danger to such a wound would be, if any, by leaving it open or exposed to foreign substances, particularly to your clothing, for a period of two hours or so immediately following the injury?

"A. Well, naturally, if you'd bring any substance which carries infection to a wound, why, naturally there is danger.

"Q. Dirty clothing or any kind of clothing might?

"A. Any substance which if it wasn't sterile.

"Q. Yes. Now, on the 4th day of August, what condition did you find the patient in at that time?

"A. Well, I found rather a critical condition. We took the leg down; that is, we took the plaster off the leg so that we could get at the wound and treat the wound. However, the wound, although it looked infected, it was not such that it would account for his condition. That is, in other words he had more than a local reaction. We knew that he had [fol. 226] a systemic infection then; the fact that the local wound,—all his symptoms were not due to the local wound.

"Q. Had he lost considerable blood at the time he came to the hospital?

"A. Well, that would be rather difficult for me to answer although I—I wouldn't say that the loss of blood at the time of his admittance was the cause of any critical condition.

"Q. During the time he was here, during your treatment, did you consider transfusion?

"A. No; I don't believe in transfusions in acute infections.

"Q. What was the cause of his death, Doctor?

"A. I'd say the cause of his death was a grave intoxication due to the liberation of toxic material by living organisms within the circulatory system.

"Q. Superinduced by what?

"A. Superinduced?

"Q. Caused by?

"A. Which had probably entered the circulation from a wound sustained on August 1st.

"Q. Is septicemia what is known to the layman as blood poison?

"A. Are you asking me whether they are synonymous?

"Q. Yes.

"A. Well, no, and yes. The word "blood poisoning" as usually interpreted by the laity includes a variety of conditions. However, if I was to designate blood poisoning in a medical term, I'd say it was septicemia.

"Q. If septicemia had not set in in this particular case, [fol. 227] Doctor, do you think the injury was sufficient to have caused his death?

"A. No; no; I do not.

"Q. Is it important in a wound of this nature to get the patient to a hospital at as early a date as possible?

"A. Naturally it is; in any condition the sooner a man receives treatment, the better; the more likely the cure is likely to be obtained.

"Q. In your general practice, Doctor, as a private practitioner——

"A. (Interposing.) I have never practiced privately.

"Q. You never have. Well, in your general practice you know what is meant by "medical first-aid kit" generally?—as used by industries?

"A. I have some knowledge of it; yes.

"Q. What does it contain?

"A. It usually contains antiseptic, sterile dressings, and simple remedies for control of hemorrhage, stimulation in case of shock.

"Q. And is it common practice for those to be used by the ordinary layman?

"Mr. Pierce: I am going to object to that on the grounds that I don't think the doctor is qualified to tell about what the ordinary layman might use.

"A. Well, judging by the campaigns which you read about in the newspapers, I would think that they would

be fairly well acquainted with it, although from personal experience I can't say.

"Q. What uses are made of them, Doctor, if you know?

"Mr. Pierce: A general objection—incompetent, irrele-
[fol. 228] vant and immaterial—nothing to do with the issues in this case, and not having any probative value.

"A. Yes. What uses? Well, they would be used for preventives and curatives.

"Q. If suitable and proper first-aid appliances and disinfectants are used promptly, is that in your opinion of any advantage or assistance to the patient?

"A. Yes; I think it is an advantage.

"Q. And in what way? What is accomplished by it, Doctor?

"A. Well, we have said that septicemia is caused by entrance of germs—well, call it a germ—from without. Now, if you had something that you could render these germs which were taken into the wound innoxious, it would be of use. However, it is of rather a very limited value, as most of them are.

"Q. Is it an advantage to have the wound dressed with these first-aid dressings and bandaged up immediately?

"A. Yes; it is generally considered so.

"Q. From the 4th on until the 8th, the time he died, Doctor did his condition improve at any time?

"A. No; he steadily went down although he died rather quickly when he—he went bad very rapidly; from about, oh, the last six, seven hours he took a decided turn for the worse.

"Q. Ordinarily how long after the injury is it before septicemia sets in? That is, before you see some positive symptoms indicated.

"A. Of course it would depend on the nature of the infection. If he was infected with syphillis it would take him probably thirty days. If he was infected with gas it
[fol. 229] would probably take him twelve hours. Between that there is all gradations.

"Q. Well, in a wound of this kind, how long would you say? And viewing the patient as you did and what you found from your examination of him.

"A. I would say from two to three days.

"Q. I wish you would describe a little more in detail, Doctor, the extent of the fracture of the tibia and fibula. (X-ray photographs were produced.)

"A. (Examining.) Well, I can describe this pretty good. (Indicating on X-ray plate.) Just crushed—it runs into the joint. (Holding photograph to window.)

"Q. You don't have duplicates of those, do you, Doctor?

"A. No; I don't have. (Indicating.) That just shows how, when we got it in place by putting our pin through——

"Q. (Interrupting.) Up above there?

"A. We put the pin through, and one below, and put that cast on that, and it was taken after we set it, so you can see the pin right through the bone; so you can see how we got it in line. (Indicating.)

"Mr. Pierce: Got a good alignment?

"A. Yes; perfect (indicating); so if it had not been for this infection we'd probably have had a fairly walkable leg. As far as describing that I would say—the best I can is—that it is a comminuted fracture of the upper portion of the tibia extending into the knee joint, and a transverse fracture of the fibula. It is pretty hard to describe those pieces in there.

"Q. Could you tell the Court how many pieces there are—separate and distinct pieces, approximately?

[fol. 230] "A. I'd say about a dozen. Of course it is difficult to count those overlapping without X-rays at different directions, and naturally with a man as sick as he was, we didn't bother to take a lot of X-rays,—just one plate to get an idea what was wrong.

"Q. Would it be possible to borrow those until we are through with this case, and return them to you?

"A. I guess you can subpoena them.

"Mr. Zundel: The subpoena has already been served.

"Q. I don't want to disturb your record here but I would like to have those two plates (indicating). I offer those in evidence at this time.

"A. I don't have anything to do with that. That is out of my line. If you want to get them it is all right with me.

"Mr. Zundel: We will have them marked.

"Mr. Pierce: If you are going to take two, let's take them all.

"Q. What are the others?

"A. (Indicating.) That is the lower end of the cast—shows the pin in the lower part.

"Mr. Pierce: I want the one that shows the alignment—that shows what good alignment he has.

"A. (Indicating.) That is after; that is before. Those are the plates.

"Mr. Pierce: Are they numbered so we can identify them and take up with the Doctor to release them?

"A. I will put a mark on them. * * * The reason they have no numbers is that these are taken on an operating table with a portable X-ray machine.

This is (writing) "August 2, 1933, Before reduction". On the other print, (writing) "August 2, 1933, After reduction".

[fol. 231] "Mr. Wallace: We will ask that those be marked as Exhibits "1" and "2", "1" being before and "2" being after.

(An X-ray photograph designated "August 2, 1933, Before Reduction" marked for identification Plaintiff's Ex. "1", was received in evidence and is appended hereto and made a part hereof.)

(An X-ray photograph designated "August 2, 1933, After Reduction" marked for identification Plaintiff's Ex. "2", was received in evidence and is appended hereto and made a part hereof.)

"Q. Doctor, after giving first-aid to a wound of the nature that existed in Mr. Anelich's case, is it or is it not advisable to put a tourniquet on above the knee?

"A. I think that would be very bad practice.

"Q. What might the results be from the tourniquet?

"A. If the tourniquet was left on, there would naturally be gangrene below the tourniquet.

"Mr. Wallace: That is all.

"Cross-examination.

"By Mr. Pierce:

"Q. There wasn't any evidence of gangrene in this particular instance?

"A. No.

"Q. I understand, Doctor, he arrived at the hospital at 10:30 on August 1st?

"A. To be exact it says 10:50 (examining notes).

"Q. And brought in by ambulance?

"A. By ambulance.

"Q. And what treatment was given to him immediately [fol. 232] upon his arrival at the hospital?

"A. The general supportive treatment.

"Q. That is the usual and customary treatment in case of shock by bad physical injury?

"A. Yes.

"Q. And then no operative——

"A. No operative treatment.

"Q. No operative endeavor or treatment was given until 9:00 o'clock the next morning?

"A. Nine o'clock; yes.

"Q. And when you examined the wound the next morning you found no evidence of infection in the wound itself?

"A. No; I couldn't say. In other words, if I had compared it with another wound that didn't have infection—which later didn't have infection—I wouldn't have been able to have told the difference at that time.

"Q. It is pretty hard to tell, is it not, Doctor, just when the septicemia or bacteria would get into the blood stream in case of an injury?

"A. When?

"Q. Just when they get in with reference to the time of the injury; it is pretty hard to tell that, is it not?

"A. We naturally assume that it gets in at the time of the injury.

"Q. Gets in immediately and at the time of the injury?

"A. Yes.

"Q. And the endeavor of medical science is to prevent it?

"A. From getting in; yes.

"Q. And you prevent that by the use of strong antiseptics or antiseptic solutions?

[fol. 233] "A. Yes; and aseptic dressings.

"Q. And by cutting away any flesh that has been destroyed or crushed?

"A. Yes.

"Q. And you wouldn't advise the cutting away of flesh or of operations of that kind through a layman with a first-aid kit, would you?

"A. No; not by a layman; no; I wouldn't; because he might get into a lot of trouble.

"Q. If a layman went fussing with a wound of that kind, cutting away flesh, he might make it worse and make it harder for you to eventually take care of the case?

"A. Yes; he might cut the big nerve and the big blood vessels. That is aseptic treatment but only by persons who are qualified to give it.

"Q. You wouldn't advise it, however, by a person who had a first-aid kit?

"A. No; I would not.

"Q. The bacteria that got into this man's system may have gotten in at practically the very instance of the injury?

"A. Well, I would assume so.

"Q. Yes; and they were carried off in the blood stream and subsequently showed their effects here on the second or third day by the general indications as I understood you of the system? What do you call it? Systemic?

"A. That is what I would call it.

"Q. What do you call it?

"A. Systemic.

"Q. Now, it is not a question of whether they could have [fol. 234] gotten in one hour or two hours or three hours afterwards. They might have gotten in at the very time if there were bacteria in the clothes or whatever was pressing into the wound?

"A. Well, it would be the most likely thing under the circumstances.

"Q. (Continuing.) and would be carried immediately into the blood stream and would cause the condition that you found when the man arrived at the hospital?

"A. Yes; that is the most likely thing.

"Q. And there is no first-aid treatment that would prevent that, is there, Doctor, by a layman, that you know of?

"A. Well, the use of ordinary preventive measures such as antiseptics and putting aseptic dressings on the wound would minimize the possibility I would say.

"Q. Well, assuming that the man's clothes and underwear had been ground into the flesh and that the flesh was bruised, it would be a dangerous situation for a layman to endeavor to clean up, would it not?

"A. Well, I don't think that,—a layman would probably be limited to swabbing the thing with an antiseptic solution, applying a sterile dressing, and possibly placing him in the care of a hospital or physician so no further injury could occur to it.

"Q. Blood poisoning and septicemia is not unusual, is it, even where hospitalization takes place shortly after the accident occurs?

"A. You say usual?

"Q. Well, it is not unusual?

"A. Well, I would say less cases develop. I would say [fol. 235] the majority of cases do not develop the septicemia.

"Q. The majority of cases?

"A. Do not.

"Q. And that, regardless of the time they are hospitalized?

"A. Yes; I would think so. The mere fact that there are so many people living on earth is proof of that.

"Q. But it is impossible for you to tell from the observations that you made of this man, when this bacteria or poison was introduced or got into his system?

"A. I am not able to say positively but I've got an opinion.

"Q. And it may have gotten in at the very instant or within a comparatively short time after the accident occurred?

"A. Yes.

"Mr. Pierce: I think that is all.

"Redirect examination.

"By Mr. Wallace:

"Q. Doctor, assuming this man to be working on a vessel and taking in a purse line tending a winch, injured, as you found the injury, on his left leg at about eight-thirty in the morning of August 1st, 1933; that shortly thereafter the rubber boot which was on his leg was removed without cutting; that he was then placed upon a mattress, placed in a small skiff, transferred to another fishing vessel, then transferred from that vessel to a third vessel which brought him into Friday Harbor, landing in Friday Harbor approximately two hours after the injury, his underwear and

clothing remaining on his leg without any dressing or antiseptic of any kind, without any first-aid treatment, would [fol. 236] you say that he was in great danger of becoming infected during that time?

"A. That is more of an opinion, is it not, than a question of fact?

"Q. Purely an opinion.

"A. Am I supposed to give an opinion?

"Q. Yes.

"A. Well, I would say that a man who had medical treatment naturally would run less chance of having infection than if there were delay in his treatment.

"Mr. Wallace: I think that is all.

"Mr. Pierce: But he might still have the infection even if he were given medical treatment?

"A. Oh, yes; absolutely.

"Mr. Wallace: Doctor, as a matter of fact, it is impossible to tell, is it not?

"A. Nobody can tell. If I could be telling, why, man, I'd be riding around in a big automobile instead of working ten hours a day.

"Mr. Wallace: That is all, Doctor.

(Conclusion.)

The Court: We will adjourn at this time until one-thirty. The jurors are excused until that hour.

(Adjournment taken at 11:50 o'clock A. M., until 1:30 P. M.)

[fol. 237] 1:30 o'clock P. M., November 14th, 1934.

The Court convened pursuant to adjournment; all parties present as heretofore; jury in the jury box.

Mr. Zundel: If the Court please, I want it understood that these X-rays are the original records of the Marine Hospital in Seattle, and after the case is closed we have a right to withdraw them. That is the only reason we secured them.

Mr. Pierce: I have no objection. That is the agreement we made with the doctor.

The Court: You may withdraw them when this case shall have been terminated.

Mr. Zundel: Yes, when it is terminated.

"Dr. R. Laige, called as a witness on behalf of the plaintiff, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wallace:

"Q. State your name, Doctor.

[fol. 238] "A. R. Laige.

"Q. Where do you reside?

"A. 1710 East Denny Way, Seattle.

"Q. What is your business, profession or occupation?

"A. Physician.

"Q. And where were you engaged in your profession on August 1, 1933?

"A. U. S. Marine Hospital, Seattle.

"Q. Are you a licensed physician and surgeon in the State of Washington?

"A. Not in the State of Washington; no.

"Q. Are you a graduate from a medical or surgical school?

"Mr. Pierce: We will admit the Doctor's qualifications.

"A. Yes.

"Q. Doctor, did you have occasion to see Mario Anelich at the Marine Hospital in Seattle on or about August 1, 1933?

"A. I did.

"Q. What hour did you see him?

"A. I saw him at nine o'clock—nine o'clock the following morning.

"Q. You did not see him on the 1st?

"A. No; I did not.

"Q. You have heard Doctor Teufel's testimony here just given? Do you concur in the statements that were made by Dr. Teufel?

"A. I do.

"Q. Do you concur in those statements with reference to the time when the patient became infected with septicemia?

"A. You mean with his opinion?

[fol. 239] "Q. Yes.

"A. Yes; I believe I do.

"Q. You agree with that. How often did you see the patient during the eight days that he was here in the hospital?

"A. Several times during the day.

"Q. Each day?

"A. Yes; each day.

"Q. What is the advantage, Doctor, if any, in having first-aid treatment?

"A. The advantage obtained, you say?

"Q. Yes; if any.

"A. Why, the advantage obtained in giving first-aid treatment is to,—well, first of all to make the patient as comfortable as possible, and of course depending upon the nature of the injury; if the man is sick, if he is in pain, why, try to relieve his pain. If he has a wound or hemorrhage, attempt to stop the hemorrhage, and if antiseptics are available apply antiseptics to attempt to ward off infection.

"Q. Is it advisable to have those at the earliest moment possible?

"A. Yes.

"Q. The earlier the better in your opinion?

"A. Yes.

"Mr. Wallace: That is all.

Cross-examination.

By Mr. Pierce:

"Q. That is, it is advisable to give a man medical attention as soon as possible after he is injured?

[fol. 240] "A. It is advisable.

"Q. There isn't much room for argument about that.

"A. That's right.

"Q. If a man was brought into a hospital at 10:50 on August 1st, 1933, and there were no operative or other measures taken until the next morning?

"A. The next morning.

"Q. And you and Doctor Teufel looked it over?

"A. Yes.

"Q. What was done in the meanwhile? Do you know?

"A. From the time until the operation?

"Q. From the time he arrived in the hospital until the operation.

"A. The man was put in bed and made as comfortable as possible.

"Q. That is the customary and usual treatment, is it not, in case of an injury?

"A. Yes; and we also gave him some tetanus-antitoxin —was given the night that he came in here.

"Q. And then the endeavor is to make him comfortable and to permit him to recover as quickly as possible from the shock he sustained by reason of the injury?

"A. Yes.

"Q. And no attention was paid to the wound, or operative measures taken, until the next morning?

"A. Until the next morning.

"Q. Might I ask, Doctor, the next morning, was there evidence as you examined the man of treatment having been given to him?

"A. Yes.

[fols. 241-242] "Q. Was there evidence of the use of a five and half per cent solution, or some solution, of mercurochrome, or would it show?

"A. Yes; it would show. Hardly remember. I think that I remember seeing mercurochrome on the leg. I can't say that I am positive of it.

"Q. And that is recognized in the medical profession as an antiseptic and properly for this class of treatment?

"A. Yes.

"Mr. Pierce: That is all.

"Mr. Wallace: As I understand, Doctor, do you say you would make the same answers to the same questions as were made by Dr. Teufel?

"A. Yes; I would, absolutely.

"Mr. Wallace: That is all.

"Mr. Pierce: Then it will be understood that any objections that I would have made to Dr. Teufel's testimony, that I may make them to Dr. Laige's testimony also?

"Mr. Wallace: It is so understood.

(Conclusion.)

RONALD C. KINSEY, called as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wallace:

"Q. State your name, Mr. Kinsey.
"A. Ronald C. Kinsey.
"Q. And where do you reside?
[fol. 243] "A. Seattle.
"Q. What is your business or occupation?
"A. Assistant General Manager of Gorst Air Transport, Inc.
"Q. Were you engaged in that business on the first of August, 1933?
"A. Yes.
"Q. Where is the place of business of the Gorst Air Transport, Incorporated?
"A. Well, we have been at Pier 3 for five years up until last spring when we moved to Pier "B" while they were remodeling Pier 3, and during this winter we will be stationed here at Lake Union.
"Q. That is in Seattle, is it?
"A. Seattle; yes.
"Q. On the waterfront?
"A. Yes.
"Q. On Puget Sound?
"A. Yes.
"Q. What is the business of the Gorst Air Transport, Inc.?
"A. We run the Seattle, Bremerton air ferry and also have charter trips to any place.
"Q. What was your telephone number on August 1, 1933?
"A. Eliot 0998.
"Q. Was that published in the telephone directory of the Pacific Telephone & Telegraph Company?
"A. Yes.

"Mr. Pierce: Object to it as incompetent, irrelevant and immaterial, and hearsay. The book would be the best evidence.

"Q. Did the Gorst Air Transport, Incorporated, have a [fol. 244] telephone on August 1, 1933?

"A. Yes."

COLLOQUY

Mr. Pierce: I am insisting on that last objection, may it please the Court, and that is that it is purely hearsay. I am objecting to the whole line of testimony with reference to this air company on the ground it is incompetent, irrelevant and immaterial; and there is no obligation upon the part of a Master of a vessel, or any of the crew to summon an airplane for the purpose of transporting a man from the boat; and upon the further ground that there is absolutely no proof in this record that the Captain of this ship, or any member of the crew, ever saw these telephone numbers or even knew of these airplanes, or of this company's existence.

Mr. Wallace: It goes to the weight of the evidence, Your Honor. We have charged him with negligence in not calling a plane, and we are endeavoring to show that there was advertised in the telephone book, which we have proven was over there at Friday Harbor right in the office that they were in, and that they could have, had they used reasonable care, ascertained that if they had asked for the book. That is Mr. McKenzie's testimony. They would have found the number that they could have called; there are at least two airports that might have been called.

It may be that reasonable care and diligence did not require that and maybe it did. That is a question of fact for the jury to determine whether it did.

Mr. Pierce: The present point is whether the book is the [fol. 245] best evidence of that instead of these statements.

Mr. Wallace: Well, then, I will say this: Certainly a man knows his telephone number, and he knows when he is using the book daily whether it is in the book or not.

The Court: Well, insofar as the objection depends upon the theory that the testimony of the witness is not the best evidence it is overruled. As to the other phase of this, the question strictly is whether this Court is to say as a matter of law that reasonable care under the circumstances that have been testified to did not require the calling or the summoning of airplane service.

Mr. Pierce: There is the further objection too, that there is absolutely no proof in this record now, and there should

be a foundation laid, that any member of this crew ever knew about this. Now, it is under some man's name, Course Airplane Service, or something like that. The fact that it is in the book would not help anybody unless they knew the name of the firm, and just how that has any probative bearing in this case,—they could call me, for instance, in Seattle if they knew my name but if they did not know my name, the fact that my name is in the book would not help anybody.

Mr. Wallace: I believe that it is advertised, air service, right in the book. They can look for it and find it. If they wanted to find an airplane they could have gotten one. They may not have thought about it, I don't know whether they did or not; maybe they did not want to spend the money, I don't know; but we are going to show, and we have [fol. 246] shown, that they could have called one. Whether exercise of due diligence required them to or not is a question for the jury to determine, it seems to me, and to weigh the question as to whether or not they have been negligent in getting first aid to this man or getting him to medical attention. There are hundreds of cases on our books where big steamships carrying large numbers of passengers have been compelled to go into court because they did not deviate from their course and go many miles off their course to put a man to shore and get him to a hosptial. Many of them have been held liable because they did not do that; and it is all a question of fact for the jury to determine whether or not such acts are required in the exercise of due diligence. What would an ordinary person do under those circumstances? It has been shown here that this man was mortally wounded, and it has been shown that he needed medical attention, and they started out to get him medical attention. Now, we have shown what they have done and what they did not do, in a measure, and we believe that it is proper to go to the jury on that phase of it.

Mr. Pierce: I am going to predicate another objection, and that is there is no showing here yet as preliminary to this testimony that one minute of time would have been saved had they called this airplane, and until it be shown that time would have been saved the whole thing is incompetent and simply littering up the record. Until it is proved that time would have been saved the whole matter is incompetent and a matter of speculation and conjecture as

[fol. 247] to whether or not they could have saved five or ten minutes if they had used an airplane instead of taking the boat. But certainly they must first lay the foundation for the purpose of showing that they actually saved time, and that has not been established in this case yet.

Mr. Wallace: If the Court please, this witness has testified that in two hours he could have had the man in Seattle. Now, as a matter of fact, the evidence shows that fourteen hours had elapsed before they actually did get him there, and he certainly was in need not of surgical treatment but of hospital treatment in a hospital where they could administer a drug to him, an anaesthetic, and give him the kind of treatment that he should have had; and the doctors say that that could not be done over there at Friday Harbor. They had no hospital there. I think it is perfectly proper to show that.

Mr. Pierce: They have established affirmatively by their own testimony that after this man got to the hospital at ten-fifty on the night this accident occurred no operative measures were taken until nine o'clock the next morning. Where, then, is there any proof here of any need for any rush after he had been treated by Dr. Sturdevant at Friday Harbor? They did not touch him except to put him to sleep until nine o'clock the next morning. Now, why waste time then in showing that we could have gotten him there? The main thing was to get him medical care. If there is any showing here that he could have gotten to a doctor quicker by airplane it might create a different situation, but the proof in this case does not so show. The testimony of Mr. [fol. 248] Gorst is that he could have gotten there and back after he got the notice, but unfortunately fishing boats are not equipped with telephones, and the first problem was to get to a telephone. As a matter of fact, their own record shows that the man actually got to Dr. Sturdevant before he could have gotten to Seattle on an airplane.

Mr. Wallace: Admitted.

Mr. Pierce: Well, then, what is the use of wasting time about it? He got there.

Mr. Wallace: You are assuming, Mr. Pierce, that your duty has been completed when you got him to a doctor and that is not true under the law. You have got to get him where he can get relief from the injuries that he has received, or as nearly as you can do it. Now, he needed hos-

pital attention. He did not need to be dragged around from one boat to another and worn out by the time he got to the hospital so that possibly he could not withstand an operation. We do not know about that; but we do know this: That you were fourteen hours getting him into a hospital where he could have had hospital treatment, and if you had called that plane you would have had him there within two hours. Now, time is an element in this case. Even one minute earlier, Your Honor, might have saved this man's life, who can tell? Nobody can tell. If they could have gotten him to the hospital in Seattle where he perhaps could have had a different kind of treatment,—we don't know what they would have done,—he may have been alive today. It may have been that had they gotten him earlier they could have amputated his limb and saved his life, which would [fol. 249] have been at least worth something to the man. They didn't do that. We claim they did not use necessary care that is required, the care that is required of them to give him the treatment that his condition needed because of their negligent acts.

The Court: Well, I overrule the objection.

"Q. What telephone company was it served by?

"A. The Pacific Telephone & Telegraph Company.

"Q. Did the Pacific Telephone & Telegraph Company publish a directory of telephones and was there one in effect on August 1, 1933?

"A. Yes; we have one.

"Q. And was the Gorst Air Transport, Incorporated, listed in that 'phone book?

"A. Yes.

"Mr. Pierce: Same objection, incompetent, irrelevant and immaterial, pure hearsay, and the book is the best evidence.

"Q. What was your number in that book at that time, Mr. Kinsey?

"Mr. Pierce: Same objection.

"A. Eliot 0998.

"Q. Did the Gorst Air Transport, Incorporated, have available planes for transportation of passengers on August 1, 1933?

"Mr. Pierce: Objected to as incompetent, irrelevant and immaterial and having no bearing on the issues in this case.

"A. Yes; we did.

"Q. Describe the planes that you had at that time, Mr. Kinsey.

"Mr. Pierce: May it be understood that my objection—incompetent, irrelevant and immaterial, and having no bearing on the issues in this case—runs to all of this testimony? [fol. 250] "Mr. Wallace: Yes; that is satisfactory.

"Mr. Pierce: So I won't have to interrupt.

"A. Off hand I don't recall but we have always had at least two planes in service; Boeing and Keystone-Loening I believe at that time.

"Q. And were they subject to call by people who needed transportation?

"A. Yes; they were.

"Q. What were they? Land planes or seaplanes?

"A. One is a seaplane and one is an amphibian—going both on land and water.

"Q. How long would it take you, or one of your planes, to have made a trip from Seattle to the northern end of the San Juan Islands and return to Seattle, picking up a passenger at Mitchell Bay near the northern end of the San Juan Islands in Puget Sound?

"A. Approximately two hours.

"Mr. Pierce: Object to it as incompetent, irrelevant and immaterial and having no bearing on the issues in this case.

"A. Approximately, flying time, and then whatever time is necessary to put a passenger aboard. It should not take over five or ten minutes.

"Q. What was the regular charge for that service at that time?

"Mr. Pierce: Same objection.

"A. Our charter rate to the San Juan Islands is $45.00.

"Q. That is for a round trip?

"A. Yes.

"Q. In your business of air transportation did you keep [fol. 251] a memorandum or any record of weather conditions on various days?

"A. Yes; we do.

"Q. Did you keep a weather condition record for August 1, 1933?

"A. Yes; I think we have one.

"Q. And what was the weather condition on that day?

"Mr. Pierce: Objected to as incompetent, irrelevant and immaterial and not the best evidence. The Weather Bureau records may be made available. You cannot establish weather conditions by private records.

"A. The only thing our records would show as to weather,—was that '32 or '33?

"Q. 1933.

(Witness produces ledger size record book.)

"Mr. Pierce: Did you make the records yourself?

"A. Yes.

"Mr. Pierce: Your own hand writing?

"A. Yes.

"Mr. Pierce: The records you are testifying from?

"A. Yes.

"Mr. Pierce: Where did you obtain the information?

"A. From my own observation. What was that date again?

"Q. What was the weather condition August 1st?

"A. August 1st, 1933, our report shows that the weather was clear and warm.

"Q. Was there any wind that day of any consequence?

"A. No; just a slight breeze.

"Q. Was it good flying weather?

[fol. 252] "A. Yes; a clear, warm day is always good flying. Any clear day is good flying.

"Q. Now, these records that you kept there were kept in connection with your business?

"A. Yes.

"Q. And kept in the usual course of the business?

"A. Yes; we keep these records to show what effect the weather has on our traffic. That is all,—the only reason we keep a report on the weather.

"Mr. Pierce: Objected to that these records are in no way binding upon a third party, and are incompetent, irrelevant and immaterial, and pure hearsay, as far as the defendants in this case are concerned,—in no way binding upon us.

"Q. Did you keep a true and correct record of the weather conditions on that day, Mr. Kinsey?

"A. True insofar as my observation saw it.

"Q. And your record of it is correct, made by yourself?

"A. Made by myself; yes; and correct as to my observations.

"Q. And made in connection with your business of flying?

"A. Yes.

"Q. Had you had a telephone call or other communication requesting you to send a plane, between eight-thirty and nine o'clock in the morning, would you have had a plane available at that time?

"A. Yes; we are on call any time after daylight until sundown on regular charter rates, or double fare after dark.

"Mr. Pierce: Object to it and move that the answer be stricken as not responsive to the question.

"A. I said, yes; it was available, all that day, I don't [fol. 253] know what time he is talking about.

"Mr. Zundel: He said between eight and ten.

"Q. August 1st.

"A. Yes; we did.

"Q. Shortly after eight-thirty in the morning you had a plane available?

"A. Yes.

"Q. And if a call had come in, a response would have been made to it?

"Mr. Pierce: Object to it as purely speculative.

"Q. I withdraw that question. Mr. Kinsey, do you know whether or not there were other available air service in Seattle at that time?

"A. Well, the Seattle-Victoria air mail was in service at that time.

"Mr. Pierce: Move that it be stricken on the grounds that it is pure hearsay, incompetent, irrelevant and immaterial.

"Q. Where was their place of business?

"A. 56 Roanoke Street.

"Mr. Pierce: Same objection to all this—immaterial and pure hearsay.

"Q. You know of your own knowledge that they did have a service available for calls for charters for planes?

"A. As far as I know, they had a plane available all the time. They run the Victoria mail.

"Q. Was that Company listed in the Pacific Telephone & Telegraph Company's Seattle directory?

"Mr. Pierce: Object to it as incompetent, irrelevant and immaterial and pure hearsay, and clearly not within the knowledge of this defendant.

[fol. 254] "A. Yes, sir.

"Mr. Pierce: Not the best evidence.

"Q. Did you have occasion to communicate with them by 'phone at that time, or about that time, during the year 1933?

"A. I don't know that I called them about that time but we communicate with them on the average of once a week at least.

"Q. And you do so by 'phone?

"A. Yes.

"Q. Do you recall now what their number was?

"A. Capitol 4200.

"Mr. Pierce: Same objection to all this.

"Q. And that Capitol 4200 was listed in the Pacific Telephone & Telegraph Company's Seattle telephone directory?

"A. Yes, sir.

"Mr. Pierce: Same objection.

"Mr. Wallace: I think that is all. You may inquire.

"Cross-examination.

"By Mr. Pierce:

"Q. What planes did you have available on the morning of August 1st, 1933?

"A. Well, I can't say exactly off hand but I can tell you by looking it up on the aeroplane log book.

"Q. How many planes were there?

"A. We had two planes.

"Q. And both of them in service on the regular ferry line that you run between Seattle and Bremerton?

"A. Well, I couldn't say without looking it up on the log because I haven't looked to see which plane was on the [fol. 255] run at that time. In cases of emergency, however, we take a plane off the Bremerton run.

"Q. But you do advertise and did at that time advertise a regular schedule running between Seattle and Bremerton and in which one of these planes was used?

"A. Yes; we had a plane on the line on that day because my traffic report shows trips made.

"Q. And what other plane was available?

"A. Keystone-Loening or Boeing—the one that wasn't on the line would have been available.

"Q. Do you have a distinct recollection that it was available that day?

"A. I don't without looking it up. I can look it up for you.

"Q. Where was your office at that time?

"A. Pier 3, foot of Madison Street.

"Q. And where were your planes? Where was the extra plane kept at that time?

"A. Pier 3, in hangar—in this same hangar.

"Q. And did you keep flyers always on duty?

"A. Always have.

"Q. Besides the one that was operating the plane running between here and Bremerton?

"A. Oh, most of our overhaul work is done at night so that the plane might not have been available during the night time, although we usually keep one plane always ready for flight.

"Q. But how about an operator up in that plane during each day? Do you always keep an additional operator there? What do you call them—"operator" or "pilot"?

"A. Pilot.

[fol. 256] "Q. All right. Is there an additional pilot there at all times?

"A. No; not necessarily; no; but we can get one on short notice.

"Q. Well, on the morning of August 1st, 1933, do you know whether any pilot was available?

"A. We always have one pilot that is on the Bremerton run and in case of emergency can be taken off.

"Q. Was there another pilot available to drive the other plane that day—operate it?

"A. I can't recall. Probably so.

"Q. What do you have?—an hourly schedule between Seattle and Bremerton?

"A. No; we ran during 1933 and '34 on the odd hour, every other hour.

"Q. That is, you would have a man leaving here from Seattle to Bremerton at seven and another at nine?

"A. One at nine—eleven—one—three—five.

"Q. Then between the hour of nine and eleven the plane would be at Bremerton?

"A. No; he would be in Bremerton until nine-thirty. He'd be back in Seattle at nine-forty-five.

"Q. In your calculation as to the time it would take you to get to Friday Harbor, did you take into consideration the fact that some time might have to be spent in locating a pilot?

"A. No; because, as I say, in case of emergency—why, there is a rush trip—we'd take the Bremerton plane. We very frequently do that.

"Q. Did you take into consideration the time that you [fol. 257] might have been put to in getting in touch with the pilot of the plane if it happened to be at Bremerton at that time the call came in?

"A. That only takes about two minutes to put a direct call to our Bremerton office, and if he were enroute, why, it would be a matter of twelve minutes.

"Q. What kind of a plane is it that you operated, or that you have that was available on that day?

"A. I couldn't say without looking up the records to see which ship was on the run.

"Q. How many passengers does it carry?

"A. I believe it was the Keystone-Loening and that carries eight passengers.

"Q. Well, are you certain of that?

"A. Of the number of passengers or of the plane?

"Q. Of the plane.

"A. I couldn't tell you without looking up the record but I can do so if you want me to.

"Q. If it lands on the water how high is the entrance to the plane from the water?

"A. Oh, on the Keystone-Loening it is about a foot and a half. On the Boeing it is about two feet and a half, three feet.

"Q. And is the entrance directly into where the pilot sits or into the passenger carrying compartment?

"A. Well, in the Loening plane it is into a passenger compartment, and in the Boeing it is into,—the passengers and pilot are in the same compartment.

"Q. And in the passenger compartment what facilities are there for taking care of an injured party?

"A. Well, in either plane there is room for a passenger to lay down.

[fol. 258] "Q. On what?

"A. In the Boeing the rear seat accommadates three passengers and in the Loening we take out the seats and make a regular bed on the floor.

"Q. And how wide are the three seats?

"A. Well, that is about four feet wide—four feet and a half.

"Q. I mean, that wouldn't accommodate a man that was five feet nine inches tall then, would it?

"A. He could,—he wouldn't be laying prone, no; but he would have room to lay on the seat the same as in the rear of an automobile.

"Q. Now, in the other possible plane was there any room for him to lay prone?

"A. Yes; we have in that plane,—it takes about two minutes to take the seats out and then there is an eight foot space in which to make a bed.

"Q. Eight by what?

"A. Eight by three about.

"Q. The time that you gave us—two hours—was the actual flying time?

"A. Yes; approximately; and then there is your wind conditions.

"Q. Not taking into consideration any delay that there might be at either end—either in locating your passenger, or in locating the pilot or plane at this end?

"A. That's right. That is actual flying time.

"Q. That is actual flying time. So if the call has been received it might have taken considerable longer than an hour [fol. 259] —two hours or one hour—for you to get up there?

"A. About one hour at the extreme I would say. An extreme to get ready would be thirty minutes if we had to call him back from Bremerton and gas up.

"Q. So it might take you one hour and thirty minutes to get there?

"A. An hour to get back; that would be an extreme case; yes.

"Q. Have you made any allowance there for a man that was severely injured and had to be located or placed in the plane by others? That would lengthen the time again, would it not?

"A. As I said, it is merely a matter of involving the handling. As far as locating is concerned, if there is any specific point we go right to that point.

"Q. I mean after you have located him and are getting him into the plane.

"A. If he was handling him from a boat, it would probably take five or ten minutes; not over that.

"Q. Suppose they were taking him to a hospital up town?

"A. If they were calling us, we'd presume they would have him ready when the plane got there.

"Q. Your calculation is based on that assumption?

"A. On past experience; yes, sir.

"Q. And he would be out in a boat—you made your calculations on that assumption?

"A. Or a float, or near a dock, or at some point where we could pick him up.

"Q. He could be loaded into a plane from a boat?

"A. Well, we could run into a slip if there is one there. I don't know where this point is that you are speaking [fol. 260] of.

"Q. That slip would have to be at a proper height from the water?

"A. Or we could go ashore.

"Q. If there is a landing place?

"A. Well, if there is any shore there, we could go ashore. I don't know where it is that you are speaking of.

"Q. Well, but in any event the shortest time that you would figure in actual flying time, without possible delays and so forth at one end or the other, is two hours?

"A. Yes; that is about the approximate flying time for the round trip.

"Q. Planes are bumpy sometimes?

"A. It depends on the weather conditions.

"Q. The fact that the sun is shining wouldn't make any difference about it being bumpy?

"A. You wouldn't get your bumpy weather as a rule unless it is windy.

"Q. And you do get it if it happens to be cloudy sometimes, don't you?

"A. Well, not without a wind. That bumpiness is caused by the deflection of the air during a wind.

"Q. Prior to August, 1933, had you ever advertised your jitney or aeroplane service for charter parties in the city of Everett?

"A. No; I can't say that we have.

"Q. As a matter of fact, most of your literature was devoted to advertising the service which you furnish between Seattle and Bremerton?

"A. No; we advertise over the radio and at times in the [fol. 261] local Seattle papers, and in several journals and aviation books that we have. All of our advertising contains our special trips and also the Bremerton Schedule.

"Q. Hasn't there been any extensive advertising of the fact prior to August 1, 1933?

"A. Yes; we have had that advertising going since June 15th, 1926.

"Q. As a matter of fact, from your own observation and experience, is it not true that comparatively few people know that a plane can be called anywhere off its regular route? That is a fact, is it not?

"A. Well, I am not much in a position to answer that although we'd like to have more people that do not know about it, know about it.

"Q. But your observation is that comparatively few people do know about it?

"A. Well, I don't know how many know about it, but there are not a sufficient number of them avail themselves of it to suit us. Whether they know about it, I don't know.

"Q. You have even found out that a great many people in the City of Seattle don't know of your air ferry service between the City of Seattle and Bremerton?

"A. I wouldn't be a bit surprised.

"Q. But in any event you don't recall of any advertising in any local papers or journals published in the City of Everett?

"A. No; unless they would happen to get some national aviation book or something of that sort and in which we have frequently advertised.

"Q. And you don't recall of carrying any advertising in [fol. 262] any journal, trade journal or otherwise, that circulates particularly among fishermen, prior to——

"A. (Interrupting.) Sportsmen? Yes.

"Q. I mean fishermen on a boat.

"A. No; we do not; nothing that I know of unless it would be our general advertising.

"Q. General advertising. Your pilot would go alone? If you were on a charter party to Friday Harbor or the San Juan Islands the pilot would go alone?

"A. Well, as a rule. It depends on what kind of a trip. If it is to pick up some one person or so and the weather is fairly good, he goes alone. If it is an emergency trip where we are transporting somebody from a plane to an Alaska boat or something of that sort, we send somebody with him to keep the plane away from the boat. It just depends upon the conditions of the trip.

"Q. But ordinarily the pilot would go alone?

"A. Well, no; I'd say ordinarily he'd have somebody with him on a charter trip of that sort. It is merely a matter of precaution with us.

Mr. Pierce: I think that is all.

Redirect examination.

By Mr. Wallace:

"Q. Mr. Kinsey, what was the ordinary cruising speed of your Loening plane per hour?

"A. Well, both the planes that we had in service at that time cruised between 90 and 100 miles an hour.

"Q. And at top speed what would they do?

"A. Oh, they are supposed to do about 130.

"Q. You may refresh your memory from the record if [fol. 263] you can and tell us which one of these planes was on the Seattle-Bremerton run on August 1st, 1933.

"A. I will have to look that up. I have several means of finding it. (Getting out records and examining them.) Well, on August 1st, 1933, we had the Keystone-Loening on the run. We usually put the plane on the run all day.

"Q. Did that plane leave Seattle on the first trip in the morning or did it leave Bremerton?

"A. It left Seattle at nine o'clock.

"Q. Seattle?

"A. Yes; August 1st; Keystone-Loening.

"Q. And that Keystone-Loening and the Boeing plane were both available for call between 8:30 and 9 o'clock and were both in Seattle at that time?

"A. Well, from just my memory I couldn't say whether the Boeing was being worked on or not but the Keystone-Loening which would be the ship on the run, I know was available, because it was in service at that time. I probably have records to show whether or not it was in service the day before and if it was in any work, unless the records would show a major overhaul or something like that—but we don't schedule our overhauls to come within the summer months.

"Q. Did you have available at that time, stand-by pilots?

"A. Yes; we had a stand-by—I can tell you right now we had a pilot available that day because two of our pilots flew on that day on the Bremerton run.

"Mr. Wallace: I see. That is all.

Recross-examination.

[fol. 264] By Mr. Pierce:

"Q. What time were they both available? Between eight-thirty and nine o'clock in the morning? Do your records show that?

"A. Well, one pilot was on the line flying the nine o'clock and the other pilot was—(pausing).

"Q. Available?

"A. Available by 'phone call.

"Q. Subject to telephone call. That is all.

"Redirect examination.

"By Mr. Wallace:

"Q. Do you know where he lived at that time, Mr. Kinsey?

"A. Well, I did at the time; yes. If I recall, he lived at the Bremer Apartments.

"Q. And where are they located?

"A. That is on First and Wall I believe. We had a telephone connection with our pilots all the time, on our records, but I just don't recall off hand what that was. I think it was Bremer though where he lived.

"Q. The Bremer Apartments were within what time, by the ordinary means of transportation available such as taxi-cab, from your hangar where your plane was located?

"Mr. Pierce: Objected to as incompetent, irrelevant and immaterial, speculative and calling for a conclusion, and assuming facts that certainly are not in this record.

"A. Am I supposed to answer that after all that? (Laughing.)

"Mr. Zundel: Go ahead and answer. Let the Court decide.

"A. Well, if he had his car available, which he had a car, why it would take only eight or ten minutes—less than ten minutes to drive down.

[fol. 265] "Mr. Wallace: That is all.

"Recross-examination.

"By Mr. Pierce:

"Q. You don't know whether he had a car that morning or not?

"A: Well, he had a car.

"Q. You don't know positively whether he was in the Bremer apartments at that time?

"A. No; I do not, but he was—I presume that he was because both pilots were always on call and if they go some place off the regular routine of call they always inform us; when there is a pilot that is standing by, we always know where he is.

"Q. What pilot was it that was living at the Bremer Apartments at that time?

"A. Smith.

"Q. And are you certain that he was there? That is your recollection but you are not certain what place he was?

"A. He was there, available at that time.

"Q. That is, he was there, or you could reach him by telephone some place else?

"A. Yes; that is what I mean—either there or available by telephone. I don't recall the circumstances in connection with it.

"Mr. Pierce: Oh, that is all. We have bothered this man enough.

"Redirect examination.

"By Mr. Wallace:

"Q. Your testimony as to the time necessary to make the trip is based upon what factor, Mr. Kinsey?

"A. Well, on the flying time of similar trips to that point, [fol. 266] the flying time on trips to that point; not necessarily similar to it.

"Q. In the distance do you take into consideration the actual mileage?

"A. Well, if I were to estimate the time to any point, I would yes; but to Friday Harbor, we have gone there often enough so that I know what the flying time is.

"Q. I see. That is all.

"Mr. Pierce: Did you carry any telephone number or any ad in any newspaper in Friday Harbor?

"A. No; we did not.

"Q. You say you have made the trip to Friday Harbor?

"A. Yes.

"Q. Did I understand that correctly?

"A. Yes; we have made a lot of trips there.

"Q. And how did you come to make those trips?

"Mr. Pierce: Objected to as incompetent, irrelevant and immaterial, and having no bearing on anything in this case.

"Q. Did you get calls from Friday Harbor for service?

"A. Oh, we have had calls from there and we have had charter trips out of here to there.

"Q. I see. And when you say calls, you mean telephone calls?

"A. Yes.

"Mr. Wallace: That is all.

(Conclusion.)

"Mr. Pierce: Signature is waived.

[fol. 267] CERTIFICATE TO DEPOSITION

STATE OF WASHINGTON,
County of King, ss:

I hereby certify that on the 6th day of November, 1934, pursuant to Stipulations heretofore annexed, before me,

W. J. Lauckhart, Notary Public in and for the State of Washington, residing at Seattle, personally appeared the following witnesses at the time and place as stated:

Dr. W. C. Teufel at the hour of 3 o'clock, P. M., at the U. S. Marine Hospital, Seattle, King County, Washington.

Dr. R. Laige at the hour of 4 o'clock, P. M., at the U. S. Marine Hospital, Seattle, King County, Washington.

Ronald C. Kinsey at the hour of 4:30 o'clock P. M., in the office of the Gorst Air Transport, Incorporated, in their hangar stationed on the south end of Lake Union.

That the said witnesses, being by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, were examined, and deposed and said as in the foregoing depositions set out.

That the taking of these depositions was begun on the 6th day of November, 1934, and was completed on the same day.

I certify that these depositions were recorded by me in shorthand from the witnesses and in their presence and were later reduced to typewritten form under my personal supervision.

That the signing of these depositions by the respective witnesses was by counsel expressly waived.

That Plaintiff's Exhibits "1" and "2", being two X-ray plates, were the only Exhibits offered and received in evidence at the taking of these depositions, and the same [fol. 268] are appended hereto and made a part hereof.

Lastly, I certify that I am not of counsel, nor am I attorney for either or any of the parties, nor am I interested in the event of the cause; That these depositions have been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court as required by law.

In witness whereof, I have hereunto set my hand and affixed my Seal, this 10th day of November, 1934.

W. J. Lauckhart, Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

(Reading of deposition concluded.)

Mr. Wallace: Mr. Pierce, have you the deposition of the witness that we took last night?

Mr. Pierce: No, Mr. Zundel has.

Mr. Zundel: No, the Clerk has it.

Mr. Wallace: We would like to have it published and read into the record.

Miss Anelich, will you take the stand a minute, please?

[fol. 269] ROMELDA ANELICH, resumed the stand for further examination on behalf of the Plaintiff, and testified as follows:

Direct examination.

By Mr. Wallace:

Q. Miss Anelich, I hand you Plaintiff's Exhibit "I" and ask you to state what that is, if you know?

A. This is a picture we all had taken.

Q. What is it?

A. It's a picture of the family.

Q. Of the Anelich family?

A. Yes.

Q. And who does it show?

A. Mother, the two children, and Dad and I.

Q. And what is this, Miss Anelich?

A. That is a picture of my dad.

Mr. Wallace: We offer these in evidence.

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial.

The Court: I think the objection should be sustained. I do not think they hold any probative value.

Mr. Wallace: The jury might see the family,—might see the pictures, and it is an indication of health.

The Court: I sustain the objection.

Mr. Wallace: Except. We have one more deposition, Your Honor, that we want to read at this time.

Mr. Zundel: This deposition was taken last night at the Marine Hospital by stipulation, both counsel being present, [fol. 270] and it is the deposition of Lloyd Juddy, the engineer on the "Arizona".

[Title omitted]

Deposition of Lloyd Juddy, a witness called by defendant, taken before Eagan Ridenour, Notary Public in and for the State of Washington, residing at Seattle, at the

Marine Hospital, Seattle, Washington, at the hour of 7:30 o'clock p. m., November 13, 1934; Mr. Charles A. Wallace and Mr. Wilbur Zundel appearing as attorneys for the plaintiff, and Mr. Ralph S. Pierce and Mr. Edwin J. Cummins appearing as attorneys for the defendant, to-wit:

LLOYD JUDDY, produced as a witness by the defendant, first duly sworn testified as follows:

Direct examination.

By Mr. Pierce:

"Mr. Pierce: This deposition is taken on stipulation, subject to objections to be presented to the Court, instead of making them here.

"Mr. Wallace: That is all right.

Mr. Pierce:

"Q. State your full name.

"A. Lloyd Juddy.

[fol. 271] "Q. What is your business?

"A. Diesel engineer.

"Q. How long have you been engaged in that occupation?

"A. Four years with the American Tug Boat Company, and about six years altogether.

"Q. At Everett?

"A. I was assistant. I was under another man there.

"Q. Where were you working on August 1, 1933?

"A. For Tony Mardesich.

"Q. In what capacity were you working for him?

"A. I was the engineer.

"Q. How long had you been working for him on that boat?

"A. In April sometime. I don't remember the exact date.

"Q. With the beginning of the fishing season?

"A. No. I don't really know when I did start for him.

"Q. Was it at the beginning of the fishing season?

"A. No; it was before.

"Q. Did you work for him until the end of the fishing season?

"A. Yes, sir.

"Q. Have you been working for him this year?

"A. Yes, sir. I was on his boat the "Tatoosh".

"Q. When did you get back from Alaska?
"A. In August some time.
"Q. Were you working for him here on some boat?
"A. Yes, sir. I was working on the "Tatoosh".
"Q. As engineer?
"A. Yes.
"Q. Were you subpœn-ed as a witness to appear at the trial of the case coming up at Everett today?
"A. Yes, sir.
[fol. 272] "Q. When was that subpœna served on you?
"A. I couldn't state the exact date.
"Q. Was it before or after you got sick?
"A. It was before.
"Q. And you were taken sick how long ago?
"A. I was home nearly a week.
"Q. And were you brought here to the hospital?
"A. Yes, sir.
"Q. And you have been here ever since?
"A. Yes, sir.
"Q. Do you remember the occasion when Mario Anelich was hurt on August 1, 1933?
"A. Yes, sir.
"Q. Did you actually see the accident?
"A. I never saw it.
"Q. Where were you at the time the accident occurred?
"A. I was in the engine room.
"Q. On duty or otherwise?
"A. I was on duty in the engine room.
"Q. What was the first knowledge you had that somebody was hurt?
"A. A bunch of them hollered down the companion way to throw her out of gear.
"Q. What did you do?
"A. I grabbed the lever to throw out the winch.
"Q. Other than that do you know anything about the accident?
"A. No, sir; I do not.
"Q. How long did you work that engine that season?
"A. We started in July, July 5th really fishing. We had been out, but we had come back in on account of our com-
[fol. 273] pass that was out of order, and we left for the Cape at one o'clock in the morning of July 5th.
"Q. Do you know the make of the engine?

"A. A Fairbanks-Morse, sixty-five.

"Q. Did you ever make any test for the purpose of ascertaining the speed at which the drum revolved when the power was on?

"A. No, sir. I didn't know anything about that. I didn't have any reason to figure it out.

"Mr. Pierce: Take the witness.

"Cross-examination.

"By Mr. Wallace:

"Q. What was the speed of the engine, Mr. Juddy?

"A. Well, I couldn't say. I never counted the revolutions. It is not a full diesel, it is a semi-diesel, and it drops out after—it will not run, the fuel will not burn at all when it is slowed down, and so we ran it generally with the governor pretty well back, but I could not say just how fast we were running it. All it was needed for was to create enough power to pull those lines in.

"Q. How much of a load would there be on that purse line when it was out?

"A. When it was out, I could not say. I haven't followed it enough to know what the tonnage or weight would be on there. That was my first year's experience as a fisherman.

"Q. How long had you been down in the engine room at the time Anelich got hurt?

"A. They called me at a certain point on the line. I go down below just before—I don't know how many feet it was [fol. 274] before the rings come to the surface of the water, and I go down and stay, and they have a man signal to throw that out.

"Q. And you had not thrown it out yet?

"A. No, sir. They had not signaled me to throw it out until they hollered, and I threw it out.

"Q. The purse line had been taken all in at the time?

"A. No, sir.

"Q. You were still pulling in on the purse line?

"A. I was not at the purse line.

"Q. I mean your engine was pulling on the purse line?

"A. Yes, sir.

"Q. The purse lines were fastened to the winch on deck, and you were still pulling in on it at the time?

"A. Yes, sir.

"Q. Do you know about how much more line had to come in before the rings would be up?

"A. Why, it must have been over a hundred feet or more, on either one of them.

"Q. There were two lines, one on each side of the winch, on each nigger head?

"A. Yes, sir.

"Q. Both connected with the rings in the lead line?

"A. Yes, sir.

"Q. Down at the bottom?

"A. Yes, sir.

"Q. What is done with the cork line while that operation of pulling it is going on?

"Mr. Pierce: I object to that as not proper cross examina-
[fol. 275] tion. We did not offer him as an expert on fishing."

I am insisting on that objection, may it please the Court, this witness was called and subpœnaed for the sole purpose of establishing the fact of his position in the engine room at the time the accident occurred.

The Court: Well, this question is not proper cross examination of this witness. The objection will be sustained.

Mr. Wallace: Read the next question.

"Q. Now, Mr. Juddy, you had been on the "Arizona" since it started out in the spring

"A. Yes, sir.

"Q. Had you fished on it prior to that year?

"A. No, sir.

"Q. That was your first year on it?

"A. Yes, sir.

"Q. And were you familiar with the equipment on the vessel pretty generally?

"A. I was; yes, sir.

"Q. And you say you threw out the clutch when they hollered?

"A. It is not a clutch. There is a clutch, the clutch collar, and that is the brake, and you throw out the main clutch.

"Q. You disconnected it from the engine?

"A. It is already disconnected from the engine. There is a collar there, and you throw the collar in and there is another little lever there, and the big handle is on the clutch, and that stops the winches.

"Q. Where is that handle located?

"A. Right at the foot of the steps. You come down the steps and there it is, a big lever standing about this high [fol. 276] (indicating).

"Q. What clutch is it connected with?

"A. There is a jaw clutch on the back, and if that is in the boat would be going ahead, but that is throwed out.

"Q. Tell us what you actually did.

"A. When they hollered I reached over and pulled the main clutch out to stop the winches. That is the main clutch.

"Q. Did it stop the engine?

"A. No, sir. I didn't have to stop the engine. All you have to do is throw out the clutch and that stops the shaft.

"Q. Did it stop the engine?

"A. No, sir. It continued to idle.

"Q. Where was the clutch located that you disconnected when they hollered to you?

"A. Right at the back of the engine.

"Q. How many clutches are there?

"A. That is the only one. That is the main clutch. The jaws of the clutch are back in the fish hold.

"Q. What are those jaw clutches back there for?

"A. They couldn't be anywhere else.

"Q. But what are they used for?

"A. One of them is to throw the propeller shaft out, and another one works on the winches.

"Q. That is, the winch that is pulling in the purse lines?

"A. Yes, sir.

"Q. Did you throw one of those out?

"A. I didn't have anything to do with that.

"Q. You didn't throw one of those out that day?

"A. No, sir.

"Q. Then the clutch you did throw out was one that dis- [fol. 277] connected the main shaft from the engine, is that correct?

"A. No. It is the main power to the whole works. And when I threw that clutch out nothing could move.

"Q. Do I understand you now to say that when you throw out this clutch you threw out when they hollered to you that disconnected everything?

"A. Yes, sir. That leaves everything idle. It will roll. You can roll the shaft with your hand, but the engine can not roll it at all, because there is no friction there at all. There are plates in this clutch that come together.

"Q. What would keep the winch from rolling back and winding off the line when you disconnected it?

"A. They put their lines on the bit. They put their lines around the bit to hold it.

"Q. When you shut it off did you go up on deck?

"A. After they called?

"Q. Yes.

"A. Yes, sir.

"Q. How soon?

"A. Oh, I would say a couple of seconds or more.

"Q. Did you see Mr. Anelich there at that time?

"A. He was on the deck. They had him all free by the time I got there.

"Q. How did they free him?

"A. They cut the lines.

"Mr. Pierce: If you know of your own knowledge and not from what somebody told you.

"A. I don't know anything about it. He was free when I got up there.

[fol. 278] "Mr. Wallace:

"Q. And what were they doing to him at that time, or for him?

"A. One of the fellows was putting a tourniquet around his leg. I went away then. I didn't stay there.

"Q. Did he have his boot on when you saw him?

"A. Yes, sir.

"Q. Did they put this tourniquet on over his boot?

"A. His boot didn't reach that far.

"Q. Where did they put it?

"A. I didn't pay much attention. The man was in misery and I got out of there.

"Q. Did you see the flesh off his leg?

"A. I didn't see nothing. I beat it and stayed away.

"Q. And do you say he was suffering a great deal?

"A. Yes, sir; he was. You see, I don't understand their language at all, and they were talking in their own native tongue, and I figured the best thing to do was to get out of there, because they could understand each other and I would be in the road, and I stayed away.

"Q. Now, Mr. Juddy, was that stick on the "Arizona" when you were on there. (indicating photograph)

"Mr. Pierce: I object to that as not proper cross examination.

"Mr. Wallace:

"Q. I am calling your attention to plaintiff's exhibit "A", offered in evidence and received in this case, which is a picture of the winch of the "Arizona".

"A. This stick here? (indicating)

"Q. Yes, sir.

"A. It was there. It was hanging on this line.

"Q. And it had been there all season?

[fol. 279] "A. As far as I know, yes, sir.

"Q. Did you work on the "Arizona" this year?

"A. No, sir.

"Q. When was the last time you have been on the "Arizona"?

"A. Last fall.

"Q. What did they have that stick there for?

"A. You will have to ask the winch man. I did not run the winches.

"Q. Do you not know what they had it there for?

"A. No, sir; I don't know anything about this part of it, or any of this. My part was here and elsewhere on the boat.

"Q. Is it not a fact that this piece of wood was put in there so as to keep that square jawed clutch from slipping out because it was worn and would not stay in?

"A. No, sir; I could not say that.

"Q. Did you ever see that square jawed clutch there?

"A. Yes, sir. It was in very good condition, because we cleaned it and overhauled it before the season started.

"Q. You don't know what this stick is on the lever for the emergency clutch? Do you know what it was used for; why they put it there?

"A. There it is.

"Q. Do you know why they put it in there?

"A. I don't see any reason why it was there.

"Q. You could not see any reason why it was there?

"A. No, sir.

"Q. You have seen it used there on the boat, haven't you?

"A. I worked from here over this way and back. (indicating on photograph)

"Q. Didn't you see them use that on the "Arizona"? [fol. 280] Did you not see them use that stick?

"A. No, sir; I never actually seen them use it.

"Q. But it was on there when you went to work on the boat?

"A. Yes, sir.

"Q. And it was there when you left?

"A. Yes, sir. And it is still there today, I guess. I don't know.

"Q. You don't know what it was used for?

"A. No, sir; unless it was for what you say. As to why it was actually there, I don't know.

"Mr. Wallace: That is all.

"Redirect examination.

"By Mr. Pierce:

"Q. Do I understand you to say at the beginning of the season you overhauled the clutches?

"A. Yes, sir.

"Q. And what condition were they in at that time?

"A. When we overhauled them?

"Q. Yes.

"A. When I went aboard the boat they were rusty, of course, from laying idle, being on the drydock, from the dampness, but they were taken and cleaned, and we went all over that stuff, to see it was in good shape, and tightened up all the nuts and bolts, and washed it out with kerosene.

"Q. And then were they in good shape?

"A. Yes, sir.

"Q. Did they show any evidence of excessive wear?

"A. No, sir.

"Q. Did they function all right?

"A. Yes, sir.

[fol. 281] "Q. During the season while you were acting as engineer?

"A. Yes, sir. No trouble with them at all.

"Mr. Pierce: That is all.

"Recross-examination.

By Mr. Wallace:

"Q. Mr. Mardesich was on the vessel at the time, was he not?

"A. Yes, sir.

"Q. Antone Mardesich?

"A. Yes, sir.

"Q. How long had he been with the vessel?

"A. He had been there off and on on the vessel at intervals. He was not working. He was just going for his health. He can't do any work. If he works he keels over.

"Q. But he had been on the vessel at various times?

"A. Yes, sir. He didn't stay there permanently. He would go home on the buyer and then come back. He always wore his good clothes while he was aboard; not what you would call real good dress clothes, but they were not fisherman's clothes by a good long ways.

"Q. When did you examine this clutch that connected the power to the winch on the deck?

"A. That was before we went fishing, and every night I was back in there. I go back in there to oil by the clutch and we always looked at that. The chains and everything were kept well greased.

"Q. Did you notice whether or not the sprockets on that clutch were worn or broken off, some of them?

"A. No, sir; I never noticed they were.

"Q. And was the clutch worn at all, this jaw clutch? It is a square jaw clutch?

[fol. 282] "A. Yes, sir.

"Q. And was that worn at all?

"A. No, sir. The shaft and the keys were in very good condition.

"Q. What do you mean by the keys?

"A. There is a key that holds it on the shaft. That is the one that goes to the power shaft.

"Q. The stationary part of the clutch?

"A. Yes, sir.

"Q. How about the other part that worked into that?

"A. It was in very good working order.

"Q. Did it ever jump out at any time?

"A. Not to my knowledge.

"Q. You would know if it went out when you were pulling on the winch, would you not?

"A. I did not have nothing to do with that.

"Q. But as engineer, in operating the engine?

"A. Yes, sir; I would. I would know if it jumped out.

"Q. You would know when the load went off?

"A. Yes, sir.

"Q. Did you ever observe that?

"A. No, sir. It never jumped out once.

"Q. Did you know how long that clutch had been in there?

"A. No, sir. I was not acquainted with the boat before that year.

"Q. And you will say now that it was not worn to any appreciable amount?

"A. No, sir.

"Q. And you desire now to tell the court and the jury that you do not know what that stick which is forked on to [fol. 283] the lever on the deck which throws out that clutch was used for?

"A. Not exactly. I didn't have nothing to do with it.

"Q. What do you mean by "not exactly"?

"A. I do not.

"Q. Do you mean to tell the court and the jury that you never say anyone use that stick?

"A. No, sir: I never. At the time that stick was used I am not anywhere around.

"Q. How do you know that, if you don't know whether it was used or not at all?

"A. As you say it is there and used, I am not there.

"Q. As a matter of fact, Mr. Juddy, you do know that that stick was used?

"A. It is used, yes, sir, but as to what it is for, what its main purpose is I don't know. I know it is used, but I don't know exactly what they used it for. I don't have anything to do with that.

"Q. You didn't use it, but the other boys did use it.

"A. Yes.

"Q. And they used it, as a matter of fact, to keep the clutch in mesh, didn't they?

"A. I imagine that is what it is there for.

"Q. Don't you know that is what they used it for? Let us be frank about it.

"A. It was attached there for that main purpose.

"Q. I would not say the main purpose, but the purpose? To keep that clutch in mesh?

"A. I guess that is what it is there for.

"Q. What else could it be used for?

[fol. 284] "A. I don't know what it would be there for.

"Q. You could not imagine any other reason?

"A. No, sir.

"Redirect examination.

"By Mr. Pierce:

"Q. But you never saw it used?
"A. No, sir.
"Q. And anything you would know about its use is what somebody would tell you?
"A. I can't understand those fellows very well, and the only time they really did talk with me was when they would tell me to do something on deck. They are Slavonians and I am an American, and they don't understand the American language, and it puts me in a pretty pickle, everything being Slavonian.
"Q. But you never saw it used?
"A. No, sir.
"Q. And all the time you were operating the engine the clutch never slipped out?
"A. It never slipped out once.

Recross-examination.

"By Mr. Wallace:

"Q. Who was the master in charge?
"A. Pete Mardesich.
"Q. And all the members of the crew were under his command?
"A. Yes, sir.
"Q. And they were ordered to work where he directed them to?
"A. Yes, sir.

"Redirect examination.

By Mr. Pierce:

[fol. 285] "Q. Did they all have a definite job to do?
"A. Yes, sir.
"Q. And each man performed his work?
"A. Yes, sir; day in and day out.

Recross-examination.

By Mr. Wallace:

"Q. Do you recall how Antone Mardesich was handling the line on the fall to lift the net at the time that the accident happened?

"A. I was in the engine room. I wouldn't know.

"Q. I believe you said he didn't do any work on the vessel?

"A. No, sir. He didn't do any work on the boat. If he walks up a hill he nearly keels over.

"Q. You had to use the fall to lift the net in when you got it in?

"A. Yes, sir.

"Q. Whose job was that?

"A. Gosh, I don't remember.

"Q. Was that the job that went with the man that worked on the after part of the winch?

"A. What do you mean by that?

"Q. I mean the forward part of the winch?

"A. That winch, of course, I don't know a darned thing about it. My back is to it. I don't have anything to do with it. The only time I am on that winch is when I purse up that lead line. I stay at the stern and pull those corks all the time.

"Q. And you had pursed up the line on this occasion?

"A. We had it very nearly pursed.

"Q. But you did not have the fall that is attached to the [fol. 286] boom for lifting it up out of the water——

"A. I couldn't say. I was in the engine room.

"Q. But you were still pulling in on the purse lines?

"A. No, on the corks. I don't know. I was down in the engine room. They could have had it out, but they didn't have when I went down in the engine room.

"Q. How long were you there before they hollered at you?

"A. I would say two or three minutes, maybe more.

"Q. And you were still pulling on the purse lines, they were still coming in?

"A. Yes, sir.

"Redirect examination.

By Mr. Pierce:

"Q. You don't know what was actually being pulled at the time the accident occurred?

"A. No, sir; I don't know anything about the accident.

"Q. What you are relating is what was going on when you went downstairs?

"A. Yes, sir. When they called me I dropped the line and went right straight down there.

"Mr. Pierce: That is all.

("Further the deponent saith not.)

[fol. 287] STATE OF WASHINGTON,
County of King, ss:

I, Eagan Ridenour, a notary public in and for the State of Washington, residing at Seattle, do hereby certify that pursuant to oral stipulation between counsel for the plaintiff and counsel for the defendant herein, the foregoing deposition of Lloyd Juddy was taken before me at the Marine Hospital, at Seattle, Washington, at the hour of 7:30 o'clock p. m., November 13, 1934.

That the plaintiff was represented at the taking of said deposition by Mr. Charles A. Wallace and Mr. Wilbur Zundel, and the defendant was represented at the taking of said deposition by Mr. Ralph S. Pierce and Mr. Edwin J. Cumming, their respective counsel.

That said witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, as a witness called by the defendant in the cause and court hereinbefore entitled, and upon oral examination by Mr. Wallace and by Mr. Pierce, said witness did then and there testify and give his deposition as set out on pages numbered one to 21, preceding this certificate.

That counsel for the plaintiff and counsel for the defendant expressly waived the signature of said witness to his said deposition.

That I am not of counsel for either party to this suit, nor am I interested in the outcome thereof.

In Testimony Whereof I have hereunto set my hand and official seal this 13th day of November, 1934.

(Signed) Eagan Ridenour, Notary Public. (Seal.)"

OFFERS IN EVIDENCE

Mr. Wallace: I now offer in evidence, if the Court please, all exhibits heretofore marked as Plaintiff's Exhibits, particularly those that have not heretofore been offered. I think there are two or three that have not been offered.

Mr. Pierce: What are they, Mr. Wallace?

Mr. Wallace: There is "A", "B", "C", "D", "E", "F", "G" and "H". I think "A" and one other has been admitted.

[fol. 288] The Court: I think a number of them have been admitted. There was no objection to them when they were offered.

Mr. Pierce: That is my understanding. I have not any objection to urge at this time in addition to the ones that were urged as to the photographs at the time.

The Court: Those to which objections were sustained are indicated by the record. Those that were offered and no objection made, went in as a matter of course, as would oral testimony.

Mr. Pierce: What I was trying to do was to save the objection that I had made where they had gone in over my objection.

(Whereupon impression of clutch, model of boat winch, sketch of clutch and stipulation of counsel referred to were received in evidence and marked Plaintiff's Exhibits "B", "C", "D" and "G" respectively.)

Mr. Wallace: The Plaintiff rests, Your Honor.

The Court: The jury may have a recess at this time of ten minutes.

(Jury retire to jury room.)

DEFENDANTS' MOTION FOR NON-SUIT

Mr. Pierce: At this time, may it please the Court, the Defendant seeks to challenge the sufficiency of the evidence and moves for a non-suit upon the ground and for the reason that in the evidence there is absolutely no question of negligence to be submitted to this jury at this time, or any proof of any negligence which is shown to have the slightest connection with the injuries sustained by this plaintiff.

[fol. 289] Now, as a fundamental proposition we are not now concerned with any question of seaworthiness of this vessel, the question of seaworthiness or unseaworthiness bearing only insofar as the admiralty suit is concerned. They have elected to try their case on the basis of negligence under the Jones Act, and on the basis of negligence

I presume we have got to proceed upon the assumption that the Captain of a boat owes to his seamen the duty to furnish a safe place to work.

(Argument by both of counsel.)

RULING ON MOTION FOR NON-SUIT

The Court: At the risk perhaps of it being said I am critical, I venture to suggest that it is to be regretted that some of the questions which now confront me were not raised and disposed of by pre-trial procedure. In other words, this defense of assumption of risk as pleaded was open to attack by demurrer if plaintiff's position now taken is sound, and I would not have been called upon to dicide it in the midst of trial. I might have taken an opportunity to have studied these cases further than I am now permitted to do, but be that as it may, the question is here and must be disposed of that this trial may proceed.

I direct my attention first of all to the question of whether under the statutes of Congress and the decisions of the Supreme Court of the United States and other Federal Courts, assumption of risk is available here as a defense. Now, notwithstanding some words and language of the McGinn case of 149 Wash. page 1, I take the position that the Supreme Court of the United States has given its [fol. 290] interpretation to the so-called Jones Act, and that all Courts, state or federal, must accept that interpretation.

This Jones Act is construed as an Act of Congress which incorporates in it the maritime law, the provisions of the Federal Employers' Liability Act applicable to interstate carriers, and this irrespective of whether the action is one brought in form as an admiralty action or one at law. Certainly, this case of Baltimore Steamship Co. vs. Phillips, 71 Law Ed., Page 316 so declares, and cites other decisions of the Supreme Court of the United States in support of that ruling. Therefore, there can be in this action no assumption of risk as to any unseaworthy nature or quality of the vessel or appliances. I think it is fundamental that where an act of Congress has had interpretation, Courts of the state will accept of and follow that interpretation made by the Federal Courts.

Now, it is alleged and sought to be proven in this case that this vessel and the appliances, especially and particularly the clutch or coupling used in the operation of the winch, was of such condition that the vessel was unseaworthy. Let this be granted that there is some substantial evidence of that alleged fact. There is, of course, no claim now on the part of this plaintiff that this clutch or coupling failed to hold or come out of mesh, but the argument is that, it being by reason of worn condition apt to do so, the instrumentality called a "stick" or a "brace" was supplied and put in use to hold the clutch in mesh, and [fol. 291] that this brace being thus used, the deceased was unable to release the clutch; and thus that it was the combination of a worn clutch and of an appliance used to hold that clutch in place that constitute that which renders the vessel and appliance unseaworthy, and the use of it negligent, or a wrong to the deceased.

Now, I do not recall one word of direct testimony that this stick or brace was in fact and actually in use at the time of the operations being carried on, and at the time of the deceased's injury. There is at best here testimony and evidence which lends the possible inference that this brace might possibly have been in use. Of course, if this stick or brace—or I may better call it a lock perhaps—were not in fact in use at the time of the deceased's injury, there could be no causal connection between the condition of the clutch and the use of the lock and his injury. I have wondered from an earlier stage of the case how it was to be successfully maintained on behalf of plaintiff that the failure of this alleged and claimed defective clutch to hold, had causal connection with the injury. Now, the argument is rested upon this: That it was the lock clutch that wrought the injury.

Mr. Wallace: I wish the Court would read Mr. Mardesich's testimony just before he asked to be excused from further testifying concerning the picture until he got his reading glasses. It is my recollection that he said at that time—I would not attempt to quote him now, Your Honor—that the boys used it to key it in. It is our contention, of [fol. 292] course, also that the clutch would not stay in gear if that lock was not there. Mr. Hurd testified that it would not stay in with a load of two hundred pounds on it. Lincoln testified that it would not stay in unless the lock was

in, so it did stay in; it didn't come out. We have a right to assume that it was locked in there or it would have come out.

(Argument by Mr. Wallace.)

The Court: I grant that plenty of testimony here lends the inference that this stick, or brace, or lock, was adapted to such uses as plaintiffs claim it was actually used for; but it does not follow that it was in use at the time of this injury.

(Further argument by Mr. Wallace.)

The Court: Well, I appreciate the force of what you are saying.

Mr. Wallace: This is a challenge to the sufficiency of the evidence. I have in mind a case—I can not quote the page number right at this moment——

The Court: (Interposing) The plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence that is before the Court at this time. Where here witnesses have been in conflict in their testimony I assume even that she is entitled to the benefit of the most favorable testimony that her witnesses have given; and I think I shall deny the motion. The defendant will be put upon their proof.

As to the other branch of the case, the asserted negligence in failure to use reasonable care to provide treatment, I think it requires a little time. I think that has become [fol. 293] clearly a question of fact for the jury. It may be, indeed, the most important phase of the case, because I do not infer that the injury itself and alone, or of itself alone was cause of death. It was the subsequent development of septicemia.

Of course, I think it is almost a matter of common knowledge that where there is compound fracture, and a bone exposed to contact with outside matter, that the highest probability of septicemia exists, and it may be that the germs were in this man's system and bloodstream almost from the beginning. I have little doubt on this second phase. I have some doubt as to the other; and I deny the motion for non-suit.

(Whereupon adjournment taken at 5:30 o'clock P. M., November 14th, 1934 until 9:30 o'clock A. M., November 15th, 1934.)

[fol. 294] November 15th, 1934, 9:30 o'clock A. M.

The Court convened pursuant to adjournment; all parties present as heretofore; jury in the jury box.

Mr. Pierce: May it please the Court, I am calling this witness a little out of turn because he is anxious to get away.

WILLIAM J. MALONEY, called as a witness on behalf of defendants, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. State your full name, please.
A. William J. Maloney.
Q. Where do you reside?
A. Seattle.
Q. What is your business?
A. Marine surveyor.
Q. How long have you been engaged in that business?
A. For the last eighteen years.
Q. Can you give us approximately the number of boats that you have had occasion to survey within that period of time?
A. Well, it would be very hard to say the exact number, [fol. 295] but it would run into the thousands.
Q. And what was the nature of that survey?
A. The surveyor's business has to do entirely with the operation of boats. He takes care of them when they are damaged, arranging for their repairs, and makes inspections of them when they are to be purchased or sold; and if they are stranded or burned he takes care of them and brings them to a place where they can be repaired, and he draws up the specifications for the repairs and gets prices for repairing them and superintends the work until the vessel is restored to her original condition.
Q. Did you last Fall, about a year ago, at my request, make an examination of the winch equipment on the fishing boat "Arizona"?
A. I did.
Q. Where was the "Arizona" at that time?

A. She was at the port commission dock here sidetracked.

Q. By that you mean she was on the dry dock and out of the water?

A. Out of the water, yes, sir.

Q. Did you at that time examine the clutch that operates the winch?

A. Yes.

Q. Did you examine the "Arizona" again yesterday?

A. Yes, sir.

Q. Did you at that time examine the clutch?

A. Yes, sir.

Q. In the examination that you made yesterday by whom were you accompanied, if anyone?

A. There was a Mr. Nelson was there,—I think Nelson [fol. 296] was his name,—from the Bayside Iron Works, and young Mardesich, in fact, the two younger Mardesich boys were there.

Q. Tell us now to what extent your investigation or examination of the clutch went?

A. Yesterday I had young Mardesich start the engine up and I examined the clutch; I threw it in and out and worked on it under operating conditions, and then I took a line the same size as a purse seine line and hooked that around the bulwarks.

Q. Now, make it a little clearer.

A. The bulwarks is the side of the vessel. Then, I took this line around the winch and had him run the engine at its normal speed and I tried to see how much that line would hold and see if I could stop the winch and gave it the regular test the same as under operating conditions. I tried to stall the winch and tried to stop it, and at that time I had younger Mardesich throw the clutch out and he threw the clutch out just with the movement of his knee.

Q. You mean you threw it out from where?

A. From its place.

Q. Indicate that. Will you come down here?

Mr. Pierce: I would like to have this model marked as Defendant's Exhibit One.

(Having exhibit marked.)

Q. Illustrate where he was when he threw the clutch out, and the part of this model that you refer to.

A. Well, I had the line fastened on the bulwark like this is similar to here and I had the turn on the winch in this manner. I had the line fastened on the bulwark in that [fol. 297] manner, and then I had these turns over the winch, and as the winch was running I held on this as hard as I could until such a time as I almost broke this rope, and then at the same time I told Mardesich to throw the clutch out and he stood right here and threw that out with his knee.

Q. Do you have any idea of the amount of pressure you put on that rope?

A. This rope on the end of it here had a hook which I hooked around the end here.

Q. What kind of a hook?

A. The hook was about, I think, five-eighths or three-quarters inch, I know.

Q. Go ahead.

A. It straightened the hook out partially with the strain that I put on it.

Q. Now, during any of that time tell us whether or not the clutch slipped?

A. The clutch did not slip at any time during that operation.

Q. You may resume the chair again. From the examination that you made of that clutch last Fall about a year ago and the examination and experiment that you performed yesterday, I will ask you whether or not in your opinion that clutch is a good clutch for the purposes for which it is being used?

A. Yes, that clutch is in good order and condition so far as the work it is used for.

Q. Describe the clutch as to size, depth of the jaws, and so forth.

A. The depth of the jaws on the clutch are an inch and [fol. 298] a half in depth and there has been two corners worn off of them about a half inch on each corner due to the continual engaging and disengaging it knocks the corners off.

Q. Do you know whether those pieces had been knocked off at the time of your examination last fall?

A. No, they weren't knocked off as much as they are now by any means.

Q. Did you examine the breaks for the purpose of determining in your own mind whether they were new or old?

A. There was a new break.

Q. What do you mean by "new"?

A. Well, it showed that it had been done recently. The iron wasn't saturated with oil like it would show in an old break; it was bright.

Q. Will you explain just how many clutches there are between that winch and the engine? Did you make a diagram that you drew which would illustrate that?

A. Yes, I did. (Exhibiting diagram in book.)

Q. Is that so it can be torn from your book?

A. Yes, sir.

Q. Let's have it torn out and marked.

(Having exhibit marked.)

Q. Before I leave that, would you say that clutch as you found it in actual operation was a safe or a dangerous clutch?

A. Oh, the clutch is safe.

Q. Calling your attention to a piece of paper which has been marked Defendant's Exhibit Two for identification, is this a sketch which you made?

A. Yes, sir.

[fol. 299] Q. And it is for the purpose of illustrating what?

A. Illustrating the various clutches that are on the "Arizona."

Q. Would you just stand up and show those various clutches so we will get that clear now in our minds?

A. This clutch here, or this drawing, is very much similar to the model. This drawing is something as near as I can get it; it's not drawn to scale or anything like that, but it's very similar to this model that is on view here. The only difference is your model here doesn't show the clutches. Now, I could illustrate it a little better in this way: This lower shaft here on the model is what is called the "line shaft" of the vessel. That shaft is connected from the engine directly to the propeller, and it drives the propeller of the boat. That is its main use that it is put in the boat for is to drive the propeller. This is only a secondary use for to drive the different machinery around the vessel.

Now, when the boat is not operating, or laying still, and they should want to use the machinery to hoist either the

anchor or to hoist up the purse seine, there is a clutch on this end of the shaft here that is thrown out and that disengages the propeller from the engine of the boat, and it leaves this shorter length of shaft to operate all the machinery in the boat that is necessary.

Then, immediately forward of this, what we commonly call the "number two clutch," there is another clutch, a hoop clutch; that is this one here on the small drawing.

Q. You have numbered them on the drawing, have you? [fol. 300] A. Yes, I have. This number three clutch, rather it is, because the engine clutch is the number one, the shaft clutch is the number two, and this number three clutch is the clutch that drives the power winch. The number four clutch is this one that shows right here on the model. That is the one that drives the power winch.

Now, you see when we start up this one clutch is the clutch that is built directly into the engine and that has levers on it that stand up straight something like an automobile lever. If they want the boat to go ahead they push the lever ahead, and if they want the boat to go backwards they push the lever backwards, and that movement of that lever controls the movement of this shaft, to this after clutch.

Q. That lever is located where?

A. That lever is located in the engine. And by putting that lever into neutral position in the engine room will stop this machinery, and by putting it into reverse position it will cause this winch to run in the opposite direction to where I have got the rope on it now, and to put her into go ahead position it will cause her to operate clockwise, or what is commonly called "right-handed." All of these clutches, of course, are connected just practically the same as this. This upper shaft here is what is called a "jack shaft."

Q. Did you also examine what you now designate as the "jack shaft" or sprocket shaft?

A. Yes.

Q. Are those in good condition?

A. They are slightly worn, but there is a number of years [fol. 301] of use in them still.

Q. Go ahead. Anything further in connection with the diagram?

A. No, sir, I think I have pretty well covered it all now.

Mr. Pierce: I would like to offer this at this time, as illustrative of the witness's testimony.

(Handing to Mr. Wallace.)

(Whereupon diagram referred to was received in evidence and marked Defendant's Exhibit "2".)

Q. Was there a stick of some kind attached on one side of this winch, or the wooden part of it?

A. Yes, there is what is commonly called a "lazy man's stick" is really the name of it.

Q. Did you use that stick in any of your experiments that you conducted at this time?

A. No.

Q. Now, will you tell us what a "lazy man's stick" is?

A. Well, a "lazy man's stick" is used in this manner: now, these seine boats, they have to unload their cargo and load it, for instance when they come in with a cargo of fish they have to hoist that fish out of the hold of the boat up to the dock. Well, sometimes that dock is fifteen to twenty feet higher than the deck of the boat. That is the reason for having that long cargo boom shown there on the model. Well, when they start to discharge this fish this winch is allowed to run continuously, or in other words, the clutch is thrown in and this piece of stick is put behind it and that winch runs all the time. A man hoists up his tub of fish with a rope and when it gets up to the height of the [fol. 302] dock there is another rope on the bottom of the tug which is used for tripping and the man on the winch lets go his rope quickly and the other rope is held tight and it trips the tub of fish upside down.

Q. Where does the lazy man's part come in?

A. The lazy man's stick is stuck in there permanently because there is a lot of vibration with that engine running, and unless the man was right there all the time this thing has a tendency to work out. There isn't a very great strain on it like there is when they have heavy loads in the seine. It is the light load that causes the thing to work out. When there gets a heavy load the clutch will not come out.

Q. Would that same principle apply whenever the winch was connected to the main power and the vibration present?

A. Yes, to a certain extent. If there was no heavy load on it it would have a tendency to come out. If it was run-

ning idle, for instance, and the boat operating it would after awhile shake itself out.

Q. And that is what you call the "lazy man's stick"?

A. Yes.

Q. In all of your experience did you ever know of such a "lazy man's stick" being used when there was a heavy load on?

A. No.

Q. In your judgment is there the slightest danger of this clutch as you found it a year ago and found it now, slipping out when they are engaged in the work of pulling in the nets?

A. No, I couldn't see any danger of it slipping out with a [fol. 303] load on it.

Q. Assuming a load of three thousand pounds approximately, was that the figure, Mr. Wallace, three thousand pounds?

Mr. Wallace: Something like three tons, I thought. I think Mr. Mardesich said three ton.

Q. Assuming a load of two or three tons, would there be any necessity for the use of that stick to prevent this clutch from throwing out?

A. No.

Q. Would the clutch throw out with that load on it?

A. No, sir, I put as much load on it yesterday and it would not throw out.

Mr. Pierce: Cross examine.

Cross-examination.

By Mr. Wallace:

Q. Mr. Maloney, have you ever been engaged in the fishing business?

A. Yes, sir.

Q. And when?

A. I was fishing here on the Sound from 1902 to about 1906.

Q. Fishing with your own vessel?

A. No, I was working for the Apex Fishing Company in Anacortes.

Q. What were you doing?

A. On one of the seine boats buying fish.

Q. Then you were not actually fishing?

A. Well, there is a pretty close distinction; we considered it fishing.

Q. You were not catching any fish?

[fol. 304] A. Not actually catching them, no.

Q. And you didn't operate any winches on any fishing vessel?

A. We operated a winch in the manner that I have illustrated when we discharged our fish in Anacortes.

Q. But you didn't pull any purse lines in with this winch?

A. No, not with this winch.

Q. Now, Mr. Maloney, where did you get the idea that this is a lazy man's stick? I don't quite catch the lazy man part of it.

A. That is a common expression that is used among the fishermen.

Q. Well, have you legend on it how it got that name?

A. No, not any more than there is a lot of things around a ship that have peculiar names that nobody can state how those names were arrived at.

Q. Then, you don't mean to convey to this jury that the stick is used because somebody is too lazy to do something else that might substitute and operate the same way?

A. It is in a certain sense, because if the stick isn't put in there, with the vibration it necessitates another man standing there to hold that thing in all the time.

Q. I see. Now, did you take any impressions of this clutch that drives this winch?

A. No.

Q. Why didn't you? Why didn't you do that, Mr. Maloney?

A. I measured it.

Q. I hand you Plaintiff's Exhibit "B" and ask you to look at that; and I state to you now, Mr. Maloney, that that is an impression taken off of the clutch which you examined yesterday and it was taken off yesterday. Do you [fol. 305] now tell the jury that that clutch was not worn as much as is indicated by that exhibit you now hold in your hand?

A. I presume that these pencil lines that are drawn on here show the original edge of the clutch. It is rather misleading the way it is now.

Q. The white space on it shows the worn part of that clutch.

Mr. Pierce: That is what it purports to show.

Mr. Wallace: Yes, that is what it purports to show.

A. I don't agree with that at all, because my actual measurements—presuming that this thing is one of the jaws of the clutch here——

Mr. Pierce (interposing): Will you stand up so that in pointing at the paper the jury will understand what you are talking about?

A. (Continuing:) Presuming that this is the drawing of the clutch, this pencil mark; my measurements give from this point here to this point here one inch, and a half inch from there; the depth from here to here is an inch and a half. There is a good full inch on each side of this clutch holding on.

Q. On which side of the clutch? Which side of the clutch was worn?

A. The entering side, the clutch that enters; the sliding side was the side that was worn. That is due to the fact of the impact of the snapping in and out all the time.

Q. It is divided distinctly into two parts, is it not?

A. There is two halves, yes.

Q. And one half is connected with the shaft?

[fol. 306] A. One half revolves with the shaft and is connected to the shaft with a key; the other section slides on the key-way but it is not fast to the shaft. It slides fore and aft on the shaft.

Q. Well, there is no key-way in the other half, is there?

A. Why, sure, there'd have to be a key-way in it or else it wouldn't operate; or else it would revolve just of its own self.

Q. Mr. Maloney, don't you know that this is a fact, that that half isn't keyed on to the shaft idles there on the shaft?

A. Of course, it idles on the shaft when it gets past the key-way naturally, but that has got to have something in it to hold it, otherwise it would revolve around the shaft altogether, wouldn't it?

Q. You say it is keyed to the shaft?

A. It is keyed to the shaft when it connects up. It revolves around the shaft. It must be keyed there to it or else it wouldn't operate.

Q. Will you kindly step down here, Mr. Maloney, and draw a sketch showing that clutch and how it is keyed on?

A. I don't think I could draw it just exactly as it is shown.

Q. Well, you are an expert, skilled marine inspector and you ought to be able to draw a clutch.

Mr. Pierce: That does not make him an artist.

The Witness: That doesn't make me an artist, no, but I can explain it on the model.

Q. I wish you would draw it and show how the key is in that part, that is, the male part of the clutch.

A. There is no distinction in this clutch, male or female; [fol. 307] they are both the same. That illustrates the section in the shaft, and there is a key runs along the shaft and your clutch is connected on to it here (drawing on exhibit). You see, one of those sections must be keyed to that shaft or else it would revolve.

Q. All right; let's assume that is keyed on. How is it fastened to the shaft—by a key-way?

A. Yes.

Q. Are there any set screws in it?

A. No. Looking at it in this manner, if this was the center of the shaft, your key-way would be in like that (illustrating on model).

Q. Exactly. Now, draw the other side of the clutch there and show how that is fastened to the shaft, if at all.

A. The other section I would have to practically draw the same way because it's just the reverse of that.

Q. Can't you put the other side of the clutch on this same drawing here?

A. Not very well because you see that has got to turn around a half turn before it engages, so in that way drawing it here is more or less misleading. It doesn't convey anything to me drawing it in this way. The thing is self-evident; you can see the whole thing. (Indicating on model.)

Q. Now, then, Mr. Maloney, when this turns up a half turn this part here that I am indicating——

A. (Interposing:) —engages.

Q. (Continuing:) —registers with this part and engages when the pressure is applied upon the arm that throws it in?

[fol. 308] A. Yes, sir.

Q. And you say that both of these are running on the key-way?

A. This one here is on the key-way. You see, the other one is running on the chain. This one revolves around with the chain. That is the one that holds the sprocket, there, that one (indicating). It don't make much difference which is the front or the back, but your sprocket chain is on one of them; the other one is the one that is on the shaft, and when they are engaged they cause the sprocket chain to revolve.

Q. Does the key-way run clear through?

A. No, it slides on this one. This is the one here. This one is loose. That shaft is loose.

Q. And there is no key in that?

A. There is no key on that.

Q. I understood you to say it was keyed?

A. No; the engine of the boat is running and that wheel has got to run around with the shaft.

Mr. Wallace: I ask that this be marked.

(Having exhibit marked.)

Mr. Wallace: We offer it in evidence.

(Whereupon drawing of clutch referred to was received in evidence and marked Plaintiff's Exhibit "K".)

Q. Now, Mr. Maloney, which part of the clutch is on the key-way, that is, with reference to forward or aft; which part is connected solid to the shaft, the forward part or the after part, on this particular boat?

A. The forward part, I think.

Q. Did you examine the main line shaft, as you call it, on the "Arizona" to ascertain how many pieces it consists of?

[fol. 309] A. Yes.

Q. Describe to the jury how it is made up of different pieces?

A. On the shaft, the main line shaft, I would say roughly is about forty feet in length, and the section what disconnects from the engine to the propellor is about nine feet in length, that is, the other section; and there is this jack-shaft that is approximately four feet in length.

Q. I am not asking you about that; I'm asking you about the main line shaft. How many pieces did it consist of?

A. Three pieces.

Q. Now, describe the piece and its length from the engine aft, so far as it goes.

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial, and having no tendency to prove any issue in this case, and an endeavor to prove and establish an entirely extraneous matter.

The Court: I do not see its materiality or relevancy at this time.

Mr. Wallace: Well, Your Honor, I want to show just what the equipment consists of there that drives this winch on the deck of the vessel. I think he has testified concerning the main line shaft, and the different clutches on it, and I am trying to show when we get to the clutch that drives the machinery on the deck, just what it consists of.

Mr. Pierce: There is only one thing in controversy and that is this clutch.

The Court: I will sustain the objection.

[fol. 310] Mr. Wallace: Except.

Q. As I understand you, Mr. Maloney, there are two clutches that break the main line shaft, is that correct?

A. Yes.

Q. One at the engine and one back in the after part of the ship somewhere, or aft of that first clutch?

A. Well, you can't really call it "break the shaft". I presume you mean "disconnect the shaft"?

Q. Yes.

A. But your main clutch on the engine, your reverse clutch on the engine, when it's thrown in neutral disconnects the propeller shaft entirely from the engine. That is, the engine operates just like any piece of machinery; in other words, it doesn't do anything. It doesn't make the boat or any part of the machinery in the boat move. That is one disconnection. Then, there is a disconnection when you pull out this what I have illustrated as the number two clutch, when you pull that out then you have a section of shaft there about, oh, I'd say approximately nine feet long that is running, but the remainder of the shaft from that number two clutch to the propellor is not running.

Q. Now, Mr. Maloney, are these clutches on this piece of shaft nine feet long that you have just mentioned?

A. I didn't measure the exact length of that piece of shaft. I'd say about nine feet.

Q. I'm not quibbling about the length of it. Are these clutches on that piece of shaft?

Mr. Pierce: I am objecting again because it does not tend to prove anything in this case. It cannot help to decide [fol. 311] any issue in this case, and it is incompetent, irrelevant and immaterial.

The Court: I sustain the objection.

Q. Mr. Maloney, did you put that stick in place that was attached to the winch here?

A. Yes, when the winch wasn't running I did.

Q. You did not put it in while it was running?

A. No, I didn't see any necessity for it.

Q. How much of a strain did you have on that line that was wrapped around the niggerhead at the time you were making your test, in pounds or tons?

A. I would say, judging from my experience, at least a three ton strain on that rope—the equivalent of lifting a three ton weight.

Q. To what did you fasten the hook at the outward end of your rope?

A. I passed this rope around the bulwarks and then hooked the hook on its own part; there was a turn around the bulwarks, and then the hook was hooked on the rope itself.

Q. Will you illustrate to the jury here just how you did that?

A. (Stepping to model.)

Q. Take this hook. I am assuming you had only one line out, is that correct?

A. Yes.

Q. All right.

A. Presuming that is the single hoop and there isn't any block here, this rope is hooked around in this manner around the bulwarks like that, only the bulwarks of course ran flat instead of vertical like this.

[fol. 312] Q. And what did you say the size of the hook was?

A. The hook was either a five-eighths, or three-quarters, I didn't measure it.

Q. What is the size of the hook you have in your hand?

A. This one here is probably a quarter of an inch, or three-eighths. It's easy to measure it. (Measuring hook) Well, this hook is three-sixteenths.

Q. And your hook was larger than that?

A. Oh, yes, considerably larger?

Q. In regard to this new break that you found yesterday that you say was not there when you examined it last fall, just tell the jury where it was located?

A. It was located on the clutch where the clutch slipped in and out, the clutch that operates the winch, and it had been due evidently to the clutch being banged in and out considerably. The corner was knocked off something like that drawing there.

Q. And was that on the part that idles on the shaft that the chain gear is attached to?

A. No, I think it was on the movable section.

Q. That is the one the chain gear is on, is it not?

A. Yes, sir; sliding.

Q. When you say it was similar to this shown here, you have reference to Plaintiff's Exhibit "B"?

A. Yes.

Q. Now, Mr. Maloney, how did the other corners look when compared with the new breaks? Were they longer or shorter?

A. Well, we just really couldn't explain that; the corners were knocked off on both sides but on one corner it was [fol. 313] a fresh break, done recently.

Q. How recently would you say that it had been done?

A. Well, it has been done since I saw the thing last year.

Q. And when did you see it last year?

A. I think it was sometime around September last year that I saw it when she was on the side track down there at the port commission property.

Q. Just where was the vessel at the time you went to see it? Was it afloat?

A. No, they were all side-tracked. There was about ten or twelve seine boats down on the port commission property down here, and they were all stacked up together like a row of books. They were all out for the winter; hauled out of the water and stacked up together. Every year they are put up in the same place there, taken out of the water and stored there for the winter.

Q. You don't recall the date when you made that examination?

A. I don't know the date. I don't remember the date. I have it in my records down in the car but I haven't got it with me here.

Q. Did you make a report at that time to Mr. Pierce?
A. I did.
Q. As to its condition?
A. Yes, sir.
Q. Have you a copy of that report now?
A. I have it down in my car.
Q. At that time did you see this "lazy man's stick" on the vessel?
A. Yes, it was there.
Q. It was there at that time. These fishing vessels are [fol. 314] engaged from early in the morning until late in the evening, fishing all day long, aren't they, during the season?
A. Yes, sir, always.
Q. And the buyer comes alongside of them and gets their fish, does he?
A. Yes, the buyer, at all times—day and night.
Q. And they continue to fish?
A. They continue to fish.

Mr. Wallace: I think that is all.

Redirect examination.

By Mr. Pierce:

Q. I forgot to ask one question. State whether or not the equipment you found on the "Arizona" was standard equipment, or the equipment used on boats engaged in fishing on the waters of Puget Sound?
A. It is.
Q. Could you indicate the key on the model here, anything that you put on Defendant's Exhibit One?

(Stepping to model.)

A. There is a place right here that is a square, a piece of square iron here that is connected into the shaft, that is called the "key". You can see the shaft, the moving jaw here must work with the shaft. This thing doesn't work with the shaft. You see, the shaft will revolve in the sprocket. The key doesn't run into the sprocket. The key stops right here close by this sprocket but the key must be on this, because if not you wouldn't get any connection; if not, this would revolve around, too.

[fol. 315] Q. I notice on that there is a space between the jaws. How much of a space is that? Is that standard jaw-clutch construction there?

A. Yes, sir; generally about a quarter of an inch clear is allowed on all the clutches, that is so it will come in and come out easier, and when these things are jammed in you always have a tendency to knock these corners off, because this shaft is revolving at probably two hundred revolutions a minute, and then this is stopped still, so when the action of it going in like that has a tendency to knock those corners off.

Q. Now, does that affect the efficiency of the clutch?

A. No, not as long as there is anything left to hold that thing when it is operating.

Q. Now, calling your attention to Plaintiff's Exhibit "B", do I understand that the dark section here indicates the depth of the jaws on the clutch?

A. Yes, sir, that is what I was led to understand.

Q. Now, how does that depth as shown on this exhibit compare with the actual depth of the clutch in fact?

A. It doesn't show because the actual depth of the clutch here, allowing that this dark portion is the solid portion, one inch long,—I measured it,—and the broken off part, a half inch long.

Q. As this is shown have you scaled that?

A. I haven't scaled that, no.

Q. Let's see what it is as compared to the actual jaw on the machine.

A. Well, that is practically the same thing, an inch and a half in depth.

[fol. 316] Q. Were you there when the test was made for the purpose of determining the speed of the winch?

A. Yes.

Q. How was that determined?

A. We used a revolution counter.

Q. And is that standard equipment for determining the speed?

A. Yes, sir.

Q. Tell us what you found the speed to be?

A. We had our speed on the shaft from—well, wait a minute, I have got the exact figures here some place. Ninety revolutions slow and a hundred and fifty revolutions full speed.

Q. Is that the speed of the drum on the winch?
A. Yes.
Q. From ninety to one hundred and fifty?
A. Yes, 150 was as fast as it could run.
Q. But it runs much faster than forty?
A. Oh, yes.

Mr. Pierce: That is all.

Recross-examination.

By Mr. Wallace:

Q. Well, could it run as slow as forty?
A. No, the engine is stalled.
Q. What is the size of the niggerhead on which you made this demonstration?
A. We didn't use the niggerhead to make a demonstration. We make a center punch mark in the end of the shaft and then a revolution counter was put up against that and this machine showed the exact number of revolutions of [fol. 317] the shaft.
Q. Do you know the size of the niggerhead on the after end of that winch?
A. I didn't measure it.
Q. You don't know the distance around it?
A. No.
Q. In referring to this Plaintiff's Exhibit "B", Mr. Maloney, assuming that is bent that way, you are speaking of the distance this way?
A. Yes, the depth between these two pencil marks which is an inch and a half.
Q. What is the depth this way?
A. Downwards, I'd say probably an inch and a quarter. I didn't measure that, but it's the standard clutch.
Q. You mean from the center of the shaft out to the outer edge of the clutch?
A. Yes.
Q. An inch and a quarter.
A. I'd say an inch and a quarter.
Q. And the depth of the jaw is inch and a half?
A. Yes, sir.

Mr. Wallace: That is all.
Mr. Pierce: That is all.

(Witness excused.)

[fol. 318] HAROLD F. NELSON, called as a witness on behalf of the defendants, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, please?
A. Harold F. Nelson.
Q. And you reside where?
A. Everett.
Q. How long have you lived here?
A. About twenty-four years.
Q. What business are you engaged in?
A. I am machine shop foreman at Bayside Iron Works.
Q. How long have you been there?
A. About twenty years as machinist, and foreman there about twelve years.
Q. Will you state whether or not you have occasion to do considerable work on the fishing boats during the winter in Everett?
A. Yes, we do. Our location on the dock there gives us the bulk of the marine work.
Q. Have you done work for Mr. Mardesich on the "Arizona"?
A. Yes.
Q. Did you look up your records to find out when you put the present clutch in the "Arizona"?
A. Apparently we didn't do any work on that clutch; we found nothing in our records.
Q. Did you yesterday, in company with Mr. Maloney, go [fol. 319] out to the "Arizona" and examine the clutch?
A. Yes, sir.
Q. From a practical machinist's standpoint, I will ask you whether or not that clutch is a good workable, and efficient clutch?
A. Yes, it is.
Q. I will ask you whether or not in your judgment as a machinist it is a safe clutch to operate?
A. Yes.
Q. And were you there when certain tests were made as to whether or not the clutch would slip under certain loads?
A. Yes, I was present.

Q. Tell us what the experiment was, and what happened?

A. Well, about an inch line was passed around the niggerhead four or five times, and the end of it passed through the bulwark of the vessel, and the hook hooked in as he demonstrated, and the pull was made by pulling on the end of the line and thereby tightening the coils around the niggerhead; and sufficient strain was put on the line to start the hook at the end of the line, start bending it, bending it out of shape.

Q. Is there any way of determining what the amount of pull there was on that line? Can you judge that in any way?

A. I don't know as I could accurately. It would probably take a couple tons safely enough. I'm sure I'm safe on that.

Q. Now, during the performance of that operation did the clutch slip?

A. No.

Q. Did you see on the boat a board attached to the [fol. 320] wooden part of the winch?

A. Yes, sir.

Q. During these experiments was that board used in any way in holding in place the handle that is used for throwing out the clutch?

A. No, it was not.

Q. Did you perform certain experiments for the purpose of determining the speed of the niggerhead on the winch?

A. Yes, sir.

Q. How was that experiment performed? What instruments did you use?

A. I used a speed indicator, or revolution counter, and being that there was no hole already in the end of this shaft which sticks through the end of the niggerhead there I had to drive a center plunge in there and make a hole into which I could insert the point of this revolution counter, and then by the aid of a watch we took the revolutions for a half minute.

Q. Is that the standard way by which a machinist would determine the revolutions of any particular piece of machinery?

A. Yes, it is.

Q. And what did you find the speed of that niggerhead to be?

A. The speed taken as the engine was running slow was ninety on the niggerhead, and when the engine was running full speed it was one hundred and fifty revolutions per minute.

Q. Ranging from ninety to one hundred and fifty?

A. Yes.

Q. Calling your attention to Defendant's Exhibit One for identification, did you at my request make this exhibit?

A. Yes, sir.

[fol. 321] Q. State whether or not it is built to scale according to the winch, shaft and other matters on the "Arizona"?

A. Yes, it is; it is half size.

Q. Half size?

A. Yes, sir.

Q. Same type of clutch?

A. Same type.

Q. Same type of sprockets and sprocket chains?

A. Yes.

Q. By the way, did you yesterday make an examination of those chain sprockets?

A. Yes.

Q. What was their condition?

A. They were in fair condition; there is lots of wear in them yet.

Q. What did you find as to the condition of the jaws of the clutch?

A. The corners of the clutch, the movable side, that is the side that revolves with the shaft, were rounded off due to the fact that as it revolved and was forced into the other clutch which stood stationary naturally it would knock some off of the corners.

Q. In your judgment as a machinist, did that condition that you found there in any way affect its efficiency or its holding power as a clutch?

A. No, not enough knocked off to affect it. There was enough square jaw left to hold it in positive engagement.

Q. About how much square jaw was left?

A. About an inch at the bottom.

Q. So that if it was fully engaged there would be at least [fol. 322] an inch of the clutch that would be pulling or holding?

A. Yes, sir.

Q. And that, I understand you to say, does not affect the efficiency of the clutch in your judgment as a machinist?

A. It does not.

Q. By the way, this handle—what is this handle for? That is not part of the winch, is it?

A. No; that was merely put on there because I thought that the Court might want to see the action of the rope on the drum by spinning it faster; by taking hold direct on that handle you can spin it faster than by spinning it below.

Q. There is a handle below by which you can operate it?

A. Yes.

Q. Did you see the stick that was fastened to the winch?

A. Yes, sir, I saw it.

Q. I will ask you whether or not that piece of wood was used at any time during the performance of this test?

A. No, it was not.

Q. I will ask you whether or not in your judgment as a machinist that piece of wood is at all necessary to keep this handle from slipping out at a time when there is a load on the winch?

A. It shouldn't be necessary at all when there is a load on the winch.

Q. What is the fact as to whether the clutch may slip out in the absence of a load, or from vibration, or from any other cause?

A. Yes, it could slip out if there were no load on the winch. In other words, the engaging jaws would not have sufficient pressure on them to prevent one from sliding out [fol. 323] of the other due to vibration. They are perfectly free to slide on the shaft, and in case of no pressure being applied due to the heavy torsion on the shaft they could slide out.

Q. What is the vibration of that shaft—considerable or little?

A. It seemed to be quite a little when the engine was running fast. The engine vibrates and jumps more or less in the boat and transmits it to the whole shaft line.

Q. State whether or not in your judgment there would be any tendency of the clutch to slip out in the absence of pull in rough weather?

A. Would you repeat that, please?

Q. In the case of rough weather would that increase the likelihood of this clutch slipping out if there was no pres-

sure or no pull on it, when you are fishing outside around the Cape?

A. Oh, yes, the pitching and tossing of the vessel would, of course, increase the angle that the shaft sits on, and as long as the jaw is free to slide on the shaft it naturally would slide more readily in a pitching, tossing sea.

Mr. Pierce: That is all.

Cross-examination.

By Mr. Wallace:

Q. Mr. Nelson, when you built this model which is Defendant's Exhibit One, why didn't you put the stick on the side of the model as you found it on the vessel?

A. I didn't notice the stick on the model at the time that I built that. I didn't see any stick there when I built that [fol. 324] model.

Q. Did you go aboard the "Arizona" at that time?

A. Oh, yes.

Q. And you saw the stick there yesterday?

A. I did.

Q. How was it you didn't see it when you were taking your measurements to build the model?

A. I'm sure I couldn't say whether it is an oversight of mine, or whether it wasn't there, but I didn't see it.

Q. You say there was an inch of good square jaw at the bottom of this clutch?

A. Yes.

Q. That is your testimony?

A. Yes.

Q. Now, calling your attention to Plaintiff's Exhibit "H," describe to the jury what the bottom of the clutch is.

A. What I would term the bottom of the clutch would be this part right here (indicating), right at the back end of the jaw here. This corner, in other words, was rounded off here.

Q. And what is the length of that jaw part?

A. An inch and a half.

Q. And a half inch on the outer end of it was rounded off?

A. Yes, sir.

Q. Did you make any impression with paper to duplicate the condition of the worn part of that clutch?

A. No, I didn't.

Q. I am handing you Plaintiff's Exhibit "B" and will ask you to state whether or not that shows approximately the condition that you found?

[fol. 325] A. Yes, I think that is approximately it. Here is the rest of it.

Q. In these vessels that you have been repairing here in your place of business, how many vessels have you repaired Mr. Nelson, or worked on?

A. Oh, I couldn't say that.

Q. Well, approximately. Just guess at it.

A. Oh, you might multiply twenty years by about twenty-five or thirty vessels per year,—easily that,—including off-shore steamers and fishing vessels, and all.

Q. What other fishing vessel other than the "Arizona" have you worked on that had one of these sticks on it that you saw on the "Arizona" yesterday?

A. Well, sir, I don't know as I've seen any sticks on any of them. I don't have anything to do with that end of it. I'm below decks as a general thing, down where the clutches are. I've never fished, and have nothing to do with the operating of that winch there.

Q. You don't specialize in just repairing clutches?

A. Well, I don't specialize in making sticks to hold clutches.

Q. No. But you repair the machinery of the vessel generally, don't you?

A. Oh, yes.

Mr. Wallace: That is all.

Redirect examination.

By Mr. Pierce:

Q. In the situation in which you found that clutch was this stick necessary to hold it in place when there was a pull on the winch?

[fol. 326] A. Apparently not; we tested that out thoroughly.

Q. That was the purpose of your test?

A. Yes.

Mr. Pierce: That is all.

Recross-examination.

By Mr. Wallace:

Q. The vessel was not moving at all when you made the test?

A. No.

Mr. Wallace: That is all.

(Witness excused.)

PETER JOHN MARDESICH, called as a witness on behalf of the defendants, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. State your full name, please.

A. Peter John Mardesich.

Q. Were you the Master of the fishing boat "Arizona" during the fishing season of 1933?

A. Yes, sir.

Q. How long have you been fishing?

A. Ever since I was fifteen years old.

Q. And on boats,—the "Arizona", or boats similar?

[fol. 327] A. I've fished most of the time on the "Arizona".

Mr. Pierce: I may state, may it please the court, I want to qualify this son and the other son only now for the purpose of using the model. I want to call the brother now and then I will have further questions to ask him later. I want to call him only for the purpose of demonstrating the operation of the model. That is all I am qualifying him for at this time.

You may step down for a moment.

(Witness excused.)

JOHN ANTHONY MARDESICH, called as a witness on behalf of the defendants, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. What is your full name, please?
A. John Anthony Mardesich.
Q. And you are the son of Antone Mardesich?
A. Yes, sir.
Q. Are you a fisherman?
A. Yes.
Q. How long have you been fishing?
A. Seven years.
Q. Are you generally familiar with the operation of pull-
[fol. 328] ing in the nets on the winches?
A. Yes, sir.

Mr. Pierce: I would now like to have the three men arrange this so they can show the operation on the winch, that is, Antone and Pete and John. It may take a minute for them to rig up the ropes, may it please the court. Now, if you men will come up and figure out what is what. (Arranging net.)

Q. Now, Mr. Antone Mardesich, will you just explain this model? First, I just want you to explain the model.

Mr. Wallace: You are calling him now, Mr. Pierce, as your witness?

Mr. Pierce: Oh, yes, he has been sworn, I understand.

Q. First explain generally what the model is.
A. What do you mean about the model?
Q. What does it show? A winch, or a clutch, or what does it show?
A. This is the winch here.
Q. The winch that is used in connection with fishing operations?
A. Yes, sir.
Q. And with what does the floor of the table correspond on the boat?
A. This is the bow of the boat here.
Q. Is the bow towards the mast?

A. Yes.

Q. And what does this show?

A. This is the deck of the ship.

Q. And what does the iron pipe represent?

[fol. 329] A. This is the mast, and this is the boom (indicating).

Q. Where is that situated? About that same distance?

A. Yes, about that distance, or more.

Q. Is this handle on the niggerhead there?

A. No, that is not; the machine operates from down below.

Q. What is the gadget sticking out on the other side?

A. That is a davit, what we call it. This is removable. This is the davit, and this is the block. We can take this out.

Q. This is removable on the boat, to be shifted different places?

A. Yes.

Q. But does that correspond with the davit on the boat so far as the height of these niggerheads are concerned?

A. Yes, just about the same, so it leads the line up to the drums.

Q. Now, I want you three men to come here. Pete, if you will be Captain; you were there and operating it. I want you three to go through the operations, throwing the net out and everything. Go through the operations that happened just immediately prior to the time, and that were taking place at the time Mr. Anelich was hurt. I just want to have you illustrate it without commenting on anything except how it is done.

We will assume first that your set is out and you are starting to pull it in. Illustrate it, the three of you together, showing how the ropes are handled as you pull it *it*.

Mr. Peter Mardesich: First of all we lay the net out; there is a man in the skiff in back of the boat, and as we [fol. 330] go around, circle our net out, the man in that skiff throws the line from this end of the net.

Q. Pick up the net and show us.

Mr. Peter Mardesich: There is a line off here and this end is thrown in this block and into the winch, and is fastened to the davit.

Q. Where is the line that does this?

Mr. Peter Mardesich: This one here. And after this is fastened on the davit this line is brought up to this block and to the winch; and at that time this end is being hauled in and fastened on this end and that line there is put in this block on this winch here, and that winch turns and it hauls in these lines.

Q. Who takes care of the rope? Where are the men located?

Mr. Peter Mardesich: Each man has his own job.

Q. This particular day, the day the accident happened, or under normal procedure, is there a man here to take this rope?

Mr. Peter Mardesich: Yes, there is a man here. The man is standing here hauling in this line on this side over here, coiling a line off to one side.

Q. And as it is pulled in he coils the rope?

(Answers by Mr. Peter Mardesich:)

A. Off to one side, yes.

Q. And puts it where?

A. On the deck. And the same thing is done on the other side. That line is coiled separate. (Illustrating.) This line is being hauled in at the same time this line is.

Q. What is this man called who hangs on to that line? [fol. 331] What do you call him on board boat?

A. Winch-man.

Q. And on the day this accident occurred who was taking care of the line here towards the mast of the ship?

A. George Brajcich.

Q. All right now, let's pull in the rope if you can do it. Do you want me to turn this thing for you and one of you each take a rope? Now, as I turn the winch will you do just what the man on there was supposed to do?

A. Now, before these rings come up the engineer goes down into the engine room.

Q. This is what you mean by the "rings"?

A. Yes, that is what we mean by the rings. The engineer goes down into the engine room.

Q. Now, as we come up this way (illustrating), what do you do?

A. This is fastened over here.

Q. That is done when?

A. The engineer stops the engine.

Q. And then what is done?

A. When the engine stops then a man comes over here, the front man, and myself, we grab these rings in this order (illustrating) and this here block here is fastened on this bridle.

Q. Now, who was doing that on this day? Who put the loop around there?

A. George Brajcich and myself.

Q. Who was handling the rope that was handled by John?

A. My father was.

Q. Now, it is in that shape now. What is done with the [fol. 332] ropes now?

A. I hold this block like this, pushed it up, and I hold that weight like that and this here rope here is taken off like that, and then rope is taken out like that.

Q. Now, who takes those ropes off?

A. George Brajcich. He takes this one off, and Mr. Anelich takes the rope off on this side.

Q. In other words, each winch-man takes care of his own winch?

A. Yes. And then I tell them to start the winch. Then, George Brajcich takes this line off over here.

Q. That is, out of the blocks, is that what you call it?

A. Yes. And Mr. Anelich is supposed to take this one out. Then we start and lift it up. (Illustrating operation.)

Q. Now, it is stopped again by the engineer down below. When it is started up and you start to pull the rings, who starts it? Who gives the signals to the engineer to stop it?

A. I told him to stop.

Q. Who tells him to start again when you get ready to pick up the rings?

A. I do.

Q. At the time this accident occurred was the engine running?

A. Yes.

Q. And was this operation that is now rigged up here in progress at that time?

A. Yes.

Q. That is, you were hoisting the rings?

A. Yes, sir.

Q. Go ahead. It was when it was about in this position [fol. 333] that the accident happened?

A. Yes.

Q. Now, during the time that these are coming up, what is the winch-man supposed to be doing?

A. He is supposed to take this here rope out and stand clear.

Q. Takes the rope out and stands clear?

A. And he takes this line and coils it off on his side, and Mr. Anelich is supposed to take this line and coil it off on his side.

Q. Now, as you are pulling in the rope is there anybody that has anything to do with the rope except the winch-man?

A. No.

Q. The rope is wet, is it?

A. Yes, sir.

Q. It comes right out of the water?

A. Yes.

Q. And that makes some water, of course, on the deck?

A. Yes, naturally, around this niggerhead is water.

Q. Now, just as a matter of curiosity, show us what happens now. You are supposed to have fish in there. I haven't figured out how to get the fish or the boat here although we have most everything else here.

Mr. Wallace: It is immaterial but I have no objection to it.

A. This is raised up like that and the engine is stopped again; three men after it is raised up come underneath and straighten the leads out, and when we get that straightened out then I start the winch again, and then this is let down on [fol. 334] deck, and then that is slacked down on deck like this, and then we start picking that up on the boat again.

Q. That is done by hand?

A. Yes.

Q. And the fish are dumped directly from the net into the fish pit, is that what you call it?

A. Yes. And sometimes we don't get any fish.

Q. You sometimes do not get any fish?

A. No.

Mr. Pierce: Now, unless you want to ask some questions, I am through; I just wanted to show the operation.

Mr. Wallace: I would like to ask him some questions about this now, or I can wait. It will be the same thing over again after while.

Mr. Pierce: You may take the stand then, Pete.

Mr. Wallace: Leave the lines on there, Mr. Mardesich, if I am going to interrogate him now. Are you through with him?

Mr. Pierce: No.

Q. Where did you first start fishing?

A. In the Puget Sound.

Q. By the way, where were you born?

A. I was born in Everett.

Q. And have lived here ever since?

A. I was raised in Anacortes.

Q. But your fishing experience has been on Puget Sound?

A. Yes, sir.

Q. You were the Master of this boat?

A. Yes, sir.

[fol. 335] Q. The boat is owned by whom?

A. My father.

Q. How long have you been a Master of a fishing boat?

A. Ever since my father was disabled, why, I had to take it.

Q. That is, since your father has been ill that you have been running the boat?

A. Yes.

Q. And how many years has that been?

A. How many years ago?

Q. Yes.

A. It has been about three or four years, I don't know exactly, three years I believe, or maybe four.

Q. Now, how old are you?

A. I am twenty-three now.

Q. Who hired the crew for the season of 1933, you or your father?

A. My father and I both. He knows the men better than I do.

Q. How many men were there on the crew?

A. Eight of us.

Q. Are they paid a definite wage, or what is the arrangement?

A. How's that?

Q. On what basis are they hired?

A. They work by shares.

Q. How are those shares divided?

A. Divided into twelve shares, each man gets one share; the boat and the net gets four shares and the man that runs the boat gets a share and a half.

Q. The owner furnishes the boat. What about furnishing supplies?

[fol. 336] A. The owner furnishes everything.

Q. Then, that division of shares is to take care of that, or is that deducted from that?

A. No, that is to pay the expenses, four shares.

Q. Then the men fish on shares.

A. Yes.

Q. Now, is each man given a definite assignment on the boat?

A. Yes; and he keeps that assignment the whole season through.

Q. Now, in the season of 1933 to what particular job was Mr. Anelich assigned?

A. He was working on the back winch.

Q. At the time he went on do you know whether or not he was an experienced fisherman?

A. He was doing the same job on the boat the year before he came on our boat.

Q. State whether or not he made any request for any particular job at the time of his employment?

A. No.

Q. But he was assigned to winch-man?

A. Yes, sir, he was an experienced man.

Q. Did he perform that service continuously throughout the season?

A. Yes, sir.

Q. Now, was he the aft or forward winch-man?

A. He was the aft.

Q. When did the season start on this year?

A. That year when we went out, you mean?

Q. Yes.

A. I believe we went out fishing on the 27th of June.

Q. Approximately how many settings had you made be-

[fol. 337] tween the time that you went out and the time that this accident occurred?

A. That's hard to say but it would average about four sets a day.

Q. And how many days had you been out? Could you calculate approximately how many settings you had made?

A. It must have been about 150; it's easy to figure out.

Q. You made about four sets a day?

A. Yes.

Q. Do you take any holidays when you are fishing?

A. There is one holiday when you come inside of the Sound, what we call a Sunday, and the boys go into town, you know,—sort of a rest period.

Q. Is that one day a week?

A. One day a week.

Q. They take one day a week. It is not always on Sunday?

A. It's on Saturday.

Q. Oh, it is on Saturday. And it is upon that basis that you make the calculation of having lifted the net about 150 times then during the season?

A. Yes.

Q. Now, in each of those 150 times state who was handling the rope off of the winch at the rear or the aft winch?

A. Mr. Anelich was always on that winch.

Q. Did anybody else ever handle it during that summer other than Mr. Anelich?

A. No, sir.

Q. As the rope was pulled in as you have illustrated it, pulling in the purse lines, did anyone else ever have anything to do with the rope that Mr. Anelich was handling?

[fol. 338] A. No, sir. Every man has his own job on the boat.

Q. And was that same thing true of the man that was on the forward winch?

A. Yes, sir.

Q. He handled his own rope, too?

A. Yes.

Q. On the morning this accident happened, prior to the accident, had you picked up or made any sets?

A. No; that was our first set that morning.

Q. You had not made four sets on that morning, had you?

A. No, we had not.

Q. This was your first set?

A. Yes.

Q. At the time you started to make this set tell us whether or not everybody was up, all of the crew was up, and on their job?

A. Yes, all of the crew was up.

Q. Where were you standing at the time this accident occurred, and what were you doing?

A. Well, I was standing out to one side.

Q. To the rear or forward?

A. Towards the middle of the boat to keep clear of the leads; I don't want to stand under any heavy weight that is going up in the air. I was standing back in here.

Q. The leads at that time were where?

A. They were starting to go up in the air.

Q. Now, as the accident happened, did you see him actually get caught?

A. No, I never.

Q. What was the first thing that you saw?

[fol. 339] A. Well, I heard the holler, see, and as I looked around I saw his leg tangled up so I jumped for the winch.

Q. You jumped for what part of the winch?

A. This handle here. And as I jumped for the winch that rope here was here in front of the winch, and I got tangled up myself, and I jumped free, and as I jumped the second time it was already off.

Q. Where was his leg caught, under the winch or on top of it; what was his position at the time you observed him?

A. He was standing in this order here (indicating).

Q. At the time when you were attracted over there where was his leg?

A. I saw his leg in here.

Q. On top here?

A. Yes.

Q. And then what did you do?

A. I jumped for the winch here.

Q. And your purpose in jumping for that?

A. To save him.

Q. Then what happened to him?

A. I got tangled up myself, and I jumped free.

Q. How soon after that was the engine stopped?

A. Right away quick.

Q. Now, at that time was there a board on this winch that you use occasionally?

A. Yes.

Q. Was that board against the handle or not?

A. No, sir, I never saw no board.

Q. Was the handle free so that you could have turned it at that time?

[fol. 340] A. Yes, I was watching the handle all the time I was going over there.

Q. You can take the chair again now. (Resuming witness chair.) But at the time you got free of the rope I understand the engine had stopped?

A. Yes, sir.

Q. Then what did you do? What was the next step?

A. Immediately after George Brajcich took the axe.

Q. First, what did George Brajcich do?

A. When, you see, he saw he was caught he jumped for the axe and cut the lines free.

Q. Did he cut the lines free?

A. Yes.

Q. Were there any marks left there from the axe?

A. Yes, there was.

Q. Where were they with reference to the winch?

A. How do you mean, where were the marks?

Q. With reference to the niggerhead?

A. The marks are all in one spot on the winch here.

Q. By "one spot" do you mean in a line, or in the same place?

A. Right around one spot.

Q. I want to find out whether or not they were about in the same line from the aft of the forward part?

A. Yes, they were right close in there.

Q. All right. Then after he got free who took charge of him, or where was he put?

A. After I saw that he was cut I whistled right away for help to get him to the doctor; I went on top the pilot house to grab a whistle and whistled.

[fol. 341] Q. Who was taking care of him at that time?

A. I don't know; I didn't see that.

Q. What is the signal for help?

A. We generally have three whistles.

Q. Did any boat respond to that whistle?

A. Yes, the "Congress" came right over.

Q. What was the condition of your boat with reference to being surrounded by the net at that time?

A. Naturally when you're pursing it up the corks gather up and surround the boat.

Q. Was it possible for you to have moved your boat at that time?

A. Absolutely not. That is why I hollered for help.

Q. Was it possible for the "Congress" to come immediately alongside of your boat?

A. He couldn't come alongside of the boat because the net was around the boat and he'd get his wheel caught in our net.

Q. Were you there at the time Mr. Anelich was transferred from your boat to the "Congress"?

A. Yes, sir.

Q. How was he transferred?

A. There was two of them carried him, they had him in their arms and handed him to men in the skiff of the "Congress".

Q. Now, did you go from your boat to the "Congress"?

A. No, I didn't.

Q. After that the "Congress" went on with him then?

A. Yes.

Q. Now, what immediately after that did you do?

A. We wanted to get our net up right away quick so we [fol. 342] could go to Friday Harbor.

Q. What did you do?

A. Paul Martinus helped us clear our nets right away, and with his crew we got the net up in no time.

Q. How many did that make, the total crew?

A. That was about fourteen or fifteen on the boat.

Q. And as soon as you got your net up where did you go?

A. Immediately to Friday Harbor right away.

Q. You did not see Mr. Anelich then from the time he left your boat in the skiff to go to the "Congress"?

A. No.

Q. Did you see him again?

A. At Friday Harbor. I went up to see him.

Q. Did you ever have a broken leg?

A. No, I haven't.

Q. Did you ever before this incident see a man with a broken leg?

A. No, I haven't.

Q. Have you ever had any training in first aid kit?

A. Yes, I always carry a first aid kit.

Q. Have you ever had any training in first aid, I should have said.

A. No.

Q. Do you carry a first aid kit on the boat?

A. Yes.

Q. Have you got a sample of that kit here?

A. I believe it is here somewhere.

Q. We will pass that for now. Will you bring it over later?

A. Yes.

Q. Just what was done on the boat then by the other men [fol. 343] to give assistance to Mr. Anelich you don't know yourself?

A. I don't get that.

Q. You don't know what was done immediately after Mr. Anelich was gotten off the boat, except what the boys told you?

A. Yes.

Q. Now, after you got to Friday Harbor, where did you go? I mean after you first landed, what did you do?

A. Went right up to see Mr. Anelich.

Q. Where was he at that time?

A. In the doctor's office.

Q. Did you see him at that time?

A. Yes; but he was not able to talk.

Q. At that time, or shortly thereafter, did you telephone anyone in connection with the matter?

A. Yes, I telephoned the Coast Guard.

Q. About what time was that? What time was it when you got into Friday Harbor, Mr. Mardesich?

A. Well, I really don't know exactly what time it was.

Q. About what length of time was it from the time he was hurt until you got into Friday Harbor?

A. About a couple hours, I guess,—two hours, or something like that.

Q. And about how long was it then after you got into Friday Harbor that you called for the Coast Guard?

A. I understood the Coast Guard was to be there at twelve o'clock.

Q. You did call, did you?

A. Yes, I called.

Q. Can you fix that time approximately?

[fol. 344] A. Just a little after I got there.

Q. Did you stay there then until the Coast Guard had picked up Mr. Anelich?

A. Absolutely.

Q. And after that you came into Everett?

A. Yes.

Q. And didn't do any more fishing that day, or the next day, I take it?

A. I should say not,—no, sir.

Q. Considerable reference has been made here to a stick which was tied by a string to the starboard, or the right-hand side of the boat,—I will call it the right-hand side and then I will get it right,—it was tied to the right-hand side of the winch. Do you know that stick? Do you know if there was a stick put on there with reference to this handle?

A. Yes.

Q. Who put it on there?

A. I made it myself.

Q. When did you put it on?

A. I made it in that year, the first part of the season when we was out at Cape Flattery.

Q. Had it been on there all during the 1933 fishing season?

A. Yes, it was there.

Q. Did you use that, or was it being used, on the day this accident occurred?

A. No.

Q. Did you ever use it when you were pulling in a heavy load?

A. No, it's not necessary then.

[fol. 345] Q. Then why was it put on there? Why did you put it on?

A. That is in case it would jump out when it hasn't got a load on it.

Q. Well, under what circumstances will it pull out when you haven't got a load?

A. When you're out at the Cape and some heavy swells, or the pitching of the boat, or vibration will shake it out.

Q. And was that the purpose you put it on there for?

A. Yes.

Q. During the fishing season of 1933, or 1934 either, did the clutch on that boat ever slip out on you because of the pull?

A. No, not when there is a strain on it.

Q. During the fishing season of '33 and '34 was the clutch working efficiently for the purposes for which you put it?

A. The winch always worked.

Q. Did the clutch on the day either immediately before the accident, or at the time of the accident, slip?

A. How's that?
Q. Did the clutch slip the day of the accident?
A. No.
Q. And you say the board wasn't there?
A. No.
Q. The first thing I understand you did was to do what?
A. Grab for the handle.
Q. Before you could get to it the engineer had cut it off?
A. Yes.
Q. What is this I hand you? Is this a first aid kit?

[fol. 346] Mr. Wallace: Pierce, I wish you would not lead the witness so much.

Mr. Pierce: I beg your pardon, Mr. Wallace, but since it has "first-aid kit" in large letters on it I don't think I lead him by telling him it is a first aid kit.

Q. What is this?
A. A first aid kit.
Q. Where do you keep it?
A. I keep it in the pilot house drawer.
Q. Did you have it in the pilot house drawer on this occasion?
A. Yes.
Q. What is in it? Open it up and show it.

Mr. Wallace: Object to it unless it is shown the same stuff that is in it now was in it at the time of the accident.

Q. Did you make the kit up?
A. Yes, we put everything new into it at the time we go out.
Q. It is renewed each year?
A. Yes.
Q. And that is on the boat, and was, at that time?
A. Yes.
Q. Now, did you use that first-aid kit on Mr. Anelich?
A. No.
Q. Why didn't you?
A. I didn't think a first aid kit would cure a broken leg.

Mr. Pierce: Take the witness.

[fol. 347] Cross-examination.

By Mr. Wallace:

Q. What would a first aid kit cure, Mr. Mardesich?

A. What was that question?

Q. I say, what would a first aid kit cure?

A. I suppose if you cut yourself you'd use medicine for it so it would heal quicker.

Q. You saw Mr. Anelich's leg, did you not?

A. No, I didn't.

Q. You didn't see it at all?

A. No.

Q. Who took his boot off?

A. I'm not sure who took his boot off.

Q. Was it taken off?

A. Yes, it was.

Mr. Pierce: If you know of your own knowledge. I will have the man here who took the boot off, Mr. Wallace.

Q. What were you doing while that was being taken off?

A. I was whistling for help on top of the pilot house for the boat to come.

Q. And did you come down off the pilot house before Mr. Anelich was moved off the boat?

A. Did I come from the pilot house?

Q. Yes; did you come back down on deck where Mr. Anelich was before you left?

A. Yes.

Q. And what did you do for him then, if anything?

A. We didn't do anything. We transferred him from the "Arizona" to the "Congress" right away.

[fol. 348] Q. How long was that after he was injured?

A. Right away. Everything happened so quick.

Q. Well, how many minutes?

A. I don't know minutes.

Q. Was it a half hour?

A. I should say not.

Q. Fifteen minutes?

A. I should say not. It was quicker than that.

Q. Ten minutes?

A. I don't know about minutes; it happened everything so quick. Everything was done in a hurry.

Q. In the meantime, and before he left the boat, what was done for him, if anything?

A. How's that?

Q. Before you sent him away from the boat, what was done for him?

A. There wasn't anything done. We had to get him to a doctor as soon as possible.

Q. Why didn't you put some bandages on his leg?

Mr. Pierce: Objected to because it was not shown he was there or handled the man at all.

Mr. Wallace: He was Master of the ship, Your Honor, and directs everything.

The Court: I think this is argumentative purely. You can ask him what he did.

Q. Now, when did you first know about the accident? What was the first indication that you had that somebody was hurt?

A. Somebody was hollering.

Q. Who was hollering?

[fol. 349] A. Mr. Anelich himself. He said, "Oh, Mother, my leg is caught: my leg is broken".

Q. And in what tongue did he speak?

A. In his own language.

Q. You understood that?

A. Yes.

Q. You speak it?

A. Yes.

Q. Thoroughly?

A. Well, I wasn't born in that country but I learned it from my father and mother.

Q. And in fishing on the boat, Mr. Mardesich, you use your native tongue, do you not?

A. Mostly.

Q. Most of the men on there,—in fact all of them except one,—were your own countrymen? That is, they were Austrians, is that correct?

A. Slavonians.

Q. And in the direction of the work there you used the Slavonian language, did you not?

A. We used the Slavonian language in our work, you mean?

Q. Yes.

A. Yes.

Q. Now, just after of this winch is the hatch, is it not, Mr. Mardesich?

A. Yes.

Q. And that hatch is built up above the deck, is it not?

A. Yes.

Q. And about how high would you say?

A. I couldn't say exactly,—I'd have to measure it.

[fol. 350] Q. And that hatch comes underneath this after niggerhead, does it not?

A. Yes, sir.

Q. And how far is it from this bottom rim of the after niggerhead to the deck of the hatch?

A. I don't know. I'd have to measure that, too.

Q. Now, were you standing on the hatch at the time that you heard Mr. Anelich holler?

A. On the far end of the hatch, close to the turn-table.

Q. Were you on the hatch or off the hatch?

A. I was on the hatch.

Q. What is the size of that hatch?

A. I don't know. I'd have to measure that to get the right dimensions on it.

Q. How many feet away from the after niggerhead were you at the time?

A. I don't know exactly how many feet it is.

Q. Well, could you give us an estimate?

A. I wouldn't want to miss it too far. Well, it must be about six or eight feet.

Q. Now, did you see them cut the rope off of Mr. Anelich's leg?

A. No, I never.

Q. Did you look at it to see how it was wound around?

A. I saw it just at that moment.

Q. Will you show to the jury just how the rope was around his leg, using this after end of this winch. Just step down here and show us if you can.

A. It is quite a ways back to remember how his leg was caught in that thing. When I first glanced over there the [fol. 351] rope was tangled up on this niggerhead, all tangled up, criss-cross like that,—tangled up and running around; everything was going in with the winch.

Q. Now, at that time there was no load on this line, was there?

A. No.

Q. And where was Mr. Anelich's leg?

A. It was in amongst this rope.

Q. Between the rope and the niggerhead?

A. I believe it was. It was in between this way, or something like that.

Q. Now, how many turns were around his leg and the niggerhead?

A. Well, I couldn't say that exactly how many turns there was on it.

Q. How many turns are used in pulling in?

A. Four or five turns.

Q. In pulling in, did this line come over the top of this niggerhead, or underneath it?

A. Well, on one side it comes this way (illustrating) and on the other side it comes from underneath.

Q. Which way does that winch turn when you are hauling in on the line, clockwise or opposite?

A. Well, I don't know now; I'd have to study that out.

Q. Please tell the jury that if you can.

A. On top.

Q. It is on top?

A. On top like this (illustrating).

Q. Then you take about four turns like that?

A. Yes.

[fol. 352] Q. What is done with this end of the line?

A. This end here is all coiled up over here on the side of the niggerhead, away from the niggerhead.

Q. And off of the hatch?

A. Off of the hatch.

Q. Down alongside of the hatch between the hatch and the gunwale, is that correct?

A. Yes.

Q. This length of rope he hauls half of the length of your net, doesn't he?

A. The length of the rope here?

Q. Yes.

A. The length of the rope here is half as long as that on our net?

Q. Is half as long as your net?

A. My Goodness! Our net is much larger than this.

Q. How large is your net?

A. Our net is about seventeen or eighteen hundred feet long.

Mr. Pierce: He misunderstood you. He thought you were talking about this net.

Mr. Wallace: No, I'm not talking about this net.

Q. Assuming now that we are talking about actual conditions out there and not this little play business that we have here to demonstrate with, you understand. Your net is seventeen or eighteen hundred feet in length?

A. Yes, sir.

Q. And the purse line runs clear around it, does it?

A. Yes, just like it is here.

Q. Is it knotted at any place in that, or is it a continuous [fol. 353] rope?

A. No, it is three pieces; it has to be three pieces.

Q. Where is the third piece?

A. It's right in the middle of the two other purse lines, right in the middle of the net.

Q. How long is that piece, Mr. Mardesich?

A. What piece is that?

Q. The middle piece.

A. Well, it must be around about two hundred feet. There are different sizes, you know.

Q. And then this line comes in from that middle piece to the end of the net through the rings on the lead?

A. I don't understand that. Will you explain that again?

Q. I say, this line then, this purse line,——

A. (Interposing) That is the first end of it?

Q. Yes. (Continuing.) That is attached to the middle section is it?

A. Yes.

Q. And then comes through the rings at the lead end?

A. Yes.

Q. And then it would be how long, would you say, this piece that is being wound up on the winch?

A. I don't know exactly how long it is. It is a long rope anyway.

Q. Well, is it a thousand feet long?

A. Well, when we measure anything on the boat we use fathoms, not feet.

Q. Well, how many fathoms is it?

A. A little better than a hundred fathoms.

Q. That would be six hundred feet, is that correct?

[fol. 354] A. Yes.

Q. A fathom is six feet in length?

A. Yes.

Q. And that line comes in until how close do you get to the boat with your net before you stop?

A. How close?

Q. Yes. How close do you come up before you stop?

A. What do you mean?

Q. With your net?

A. You mean the rings?

Q. Yes, the rings.

A. The rings come right up to the blocks.

Q. And come up until you get all of them up there?

A. Yes.

Q. Now, you said that when the net is down, or the rings are down, rather, about a hundred feet, the pulling-in process is stopped?

A. No; the engineer goes down in the engine room at that time when the rings are a hundred feet from the blocks.

Q. And your pulling-in process continues to go ahead?

A. Yes; until it reaches the blocks.

Q. Now, your engine is forward of the winch and down underneath the deck?

A. Yes.

Q. And that is running without anyone in attendance while you are in the process of pulling in the purse line?

A. Yes, sir.

Q. Now, do you pull in the cork line at the same time?

A. Yes, sir.

Q. What do you use for pulling that in?

[fol. 355] A. Men.

Q. Just pull it in by hand. What do you use this small niggerhead for?

A. (To Mr. Pierce:) I'd have to show him on the net there what that is for.

Mr. Pierce: Just show him.

A. You see, there is a line attached on the cork line to the lead line here; if that is in the water all the time why then the fish would naturally go out. This way we haul this end up on the boat so the fish can't go out. That is what this little niggerhead is used for.

Q. And in hauling that up, Mr. Mardesich, you bring in the corks, do you not, somewhat?

A. No.

Q. Now, when did you use the stick that was fastened to this bit, or side of the frame of the winch?

A. We use it out at the Cape in heavy swells.

Q. You use it out at the Cape in heavy swells?

A. Yes.

Q. What for?

A. To keep the winch from coming out.

Q. And what causes the winch to come out?

A. There is a space between the winch when it is idling, the vibration and the swell of the boat—it's something fierce out there—it's awfully swelly.

Q. How does it slip out, Mr. Mardesich? Just describe to the jury what happens? What takes place when it slips out?

A. What was that again?

Q. Just tell the jury what takes place when it slips out?

[fol. 356] Q. How does it get out of gear?

A. It works out by vibration of the engine or the offset of the boat in heavy [illegible] The boat is in every shape imaginable when it is out there in the rough sea.

Q. You mean the clutch separates and lets it free from the shaft, is that it?

A. Yes.

Q. From the power?

A. Yes, sir.

Q. Now, when you are pulling on the purse line taking it in, does your boat roll?

A. How's that?

Q. When you are taking in the purse line, does your boat roll?

A. It rolls plenty in rough weather.

Q. And does it roll forward and aft, or roll with the beam of the vessel?

A. It rolls all directions.

Q. Both forward and aft, and with the beam?

A. All directions.

Q. That has a tendency to slacken your purse line when it is rolling in the direction of your net?

A. No, that line is always tight; no matter how much the boat rolls that line is tight.

Q. How much weight is on that line when the purse seine is coming in?

A. Well, I've never measured or weighed it.

Q. Is it heavy?

A. It's plenty heavy.

Q. How many revolutions per minute is the niggerhead [fol. 357] or winch turning over when you are in the operation of pulling in the seine?

A. Well, I was down there with Mr. Nelson yesterday to show him the boat and I was there when he was taking the tests.

Q. Go ahead.

A. The engine was running at the regular speed to purse the net up and turns around ninety revolutions, ninety or ninety-five; and at full speed it travels to about 150, I believe it was, or something like that.

Q. That measurement was taken right off the niggerhead?

A. Right off the end of the niggerhead.

Q. Now, at which of these speeds do you operate in pulling in the net?

A. At slow speed, about ninety revolutions.

Q. And is that the slowest speed that you could operate at?

A. Yes, sir.

Q. Does the load on the line slow down the engine some?

A. A trifle so, yes, it does.

Q. Would it slow it down below the ninety revolutions per minute?

A. Well, it may about five or ten revolutions, something like that. The engine has a lot of power.

Q. These clutches are kept oiled continuously, aren't they?

A. Absolutely.

Q. What do you put on them, oil or grease?

A. We put grease and oil, and oil on the chains; grease on the couplings.

Q. Did you put the chains back on the vessel yesterday in order to make this demonstration?

[fol. 358] A. Yes—well, I never put them on myself.

Q. Who put them on?

A. My brother put them on.

Q. They had been removed?

A. I only went down when they made the test, and everything was in place.

Q. Where is the vessel now, Mr. Mardesich?

A. It is out at Deadwater Slough, they call it, out here.

Q. Now, what is that lever used for? Just tell the jury what it is used for in your fishing operation—the lever on the side of the Defendants' Exhibit One on the starboard side of that winch?

A. You mean that lever sticking out there? That is to put the winch in gear so it will turn on top here.

Q. And it is also used for putting it out of gear, too, if you want to, is it not?

A. Yes, sir.

Q. In pulling in these lines in your fishing operations there, is it necessary to engage and disengage your clutch frequently?

A. How is that?

Q. I say, in the operation of fishing, pulling in your lines, it is necessary to engage and disengage your clutch frequently?

A. What do you mean by "engage" and "disengage"?

Q. Putting it together and taking it apart.

A. Say that over again. I didn't quite understand that.

The Court: Then read the question.

(Question read by reporter: "I say, in the operation of [fol. 359] fishing, pulling in your lines, it is necessary to engage and disengage your clutch frequently?")

A. No.

Q. Well, on what occasions would you engage it or disengage it, Mr. Mardesich?

Mr. Pierce: I think if you will say "start" and "stop" the winch, it will help.

Mr. Wallace: I am examining the witness, Mr. Pierce.

Mr. Pierce: Let's talk fishermen's language instead of attorney's language.

Q. When do you pull the clutch out and put it back again?

A. When we get ready to haul in the lines it is thrown in by that handle.

Q. And when a man gets caught in it you do that too, don't you?

A. You throw the handle out.

Q. That is what you were going to do?

A. That is what I was going to do because I was closer there than I was if I had motioned down to the engine room to stop it. I was away from him.

Q. Where was your father at that particular time?
A. He was hauling up the rings.
Q. Where was he standing?
A. He was standing over there on the front winch.
Q. Well, show on Defendants' Exhibit One here just where he was standing. Mark it, will you?
A. (Witness stepping to model:) He was standing right in here hauling up this line in here.
Q. Take this pencil and mark where he was standing.
[fol. 360] A. Oh, I don't know exactly. I never saw where he was standing. I know he was standing here hauling up this line.
Q. And which side was he on, starboard or port side?
A. He was on this side here.
Q. Is that the starboard side?
A. I believe it is.
Q. Was he close to the winch?
A. Close enough so he could work.
Q. Could he have reached it with his hands?
A. The what?
Q. The winch.
A. He was handling the rope there.
Q. Well, how far away would you say he was?
A. I don't know how far away he was.
Q. Two feet?
A. I don't know.
Q. Where was George Brajcich?
A. He was taking the ropes off the blocks.
Q. On the forward block, is that correct?
A. Yes.
Q. Had Mr. Anelich removed his line from the block on the after part?
A. Why, no, he didn't get a chance to get there.

Mr. Wallace: That is all.

[fol. 361] Redirect examination.

By Mr. Pierce:

Q. Was it smooth or rough this day when you were fishing?
A. Just like in here; there wasn't a wave.
Q. Come over and show us the position of those rings and point out what would have happened had your father

let go of that rope. I want him to illustrate that. You pull it up to where it was at the time this happened, as you recall it. (Exhibiting on model.)

Q. That was on for the purpose of lifting the rings?

A. Yes.

Q. And what would have happened if that would have dropped?

A. Everything would have gone back in the water.

Q. And this is the leads here?

A. Yes. This would have dropped down on the man working there.

Q. What about the man that was working on these blocks?

A. It would probably have hit him.

Mr. Pierce: That is all.

Recross-examination.

By Mr. Wallace:

Q. Mr. Mardesich, what is the distance from those blocks over to the winch?

A. I'd have to measure that to get the exact distance.

Q. Well, your vessel is fourteen feet beam, isn't it?

A. I don't know.

Q. Well, would that be half-way—half the beam of your ship?

A. Yes, the winch is in the center of the boat.

[fol. 362] Q. And don't you know, as a matter of fact, your vessel is fourteen feet beam?

A. I'd have to find out exactly on the record on the boat.

Q. You were Master of the boat; did you have a registration?

A. Yes, but I don't read it every day when I'm on the boat.

Q. You never did read it?

A. No.

Q. What is the length of the boat?

A. I don't know exactly that either; I know it's around sixty feet.

Q. What is the depth of it?

A. I don't know that exactly.

Q. When did you examine the clutch in this vessel?

A. It's always examined before we go fishing; the whole boat is thoroughly overhauled.

Mr. Wallace: That is all.

(Witness excused.)

[fol. 363] LEE MAKOVICH, called as a witness on behalf of the defendants, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Will you state your full name please, Mr. Makovich?
A. Lee Makovich, M-a-k-o-v-i-c-h.
Q. And your business, please?
A. Well, I'm fishing part of the time, and fish buyer some years also.
Q. During the 1933 season in which capacity were you working?
A. Well, I was the head buyer on San Juan Island for the Fishermen's Packing Corporation.
Q. Of what city?
A. Of Everett.
Q. What boat, if any, did you use? I will put it this way, how do you go out?
A. We had several boats looking after the fishermen and taking care of them and getting their fish, and on that morning I happened to be on the boat "Excel II".
Q. Do you remember the horsepower of that boat?
A. I think she had a hundred and fifty.
Q. How does her speed compare with that of other boats, if you know,—with the "Arizona" or the "Congress"?
A. Very much faster.
Q. A faster boat?
A. Yes.
[fol. 364] Q. When was your first contact with this accident?
A. Well, we come down from Kanaka Bay towards this place where the accident occurred,——
Q. (Interposing.) Whereabouts was that. Do you remember the name of the place?

A. They call it right close to Mitchell Bay, Open Bay, I guess they call it. There was many boats in there setting, and naturally we had to go there to see if they needed any assistance, to pull them off the rocks or something of that kind, and at this particular time the "Congress" whistled to us and when we got into close proximity——

Q. (Interposing.) Whistled what kind of a whistle?

A. Three whistles.

Q. What does that mean to fishermen?

A. That means he wants to communicate with us, or say something to us. He said he had an injured man on board so he came alongside and the man was on the hatch on the "Congress" on a mattress, and I told the fellows, "Be careful; let's get him over on our boat with the mattress and everything together so we won't disturb him"; and I just forget how many of us, but there must have been four or five of us, picked him up and gradually put him on the hatch of the "Excel II".

Q. Was he covered at that time?

A. He was. He had a blanket wrapped around him. From there I told the Captain to proceed top speed to the float in Mitchell Bay, for me to get off. So when I got down there,—it took about fifteen or seventeen minutes, something like that,—I jumped off on to the float and told him [fol. 365] to proceed to Friday Harbor at top speed, as fast as he could go.

Q. That is, the Captain of the "Excel II"?

A. Yes.

Q. Who was that Captain?

A. I forgot his name now.

Q. Never mind. And so he went on?

A. Yes. So he went, and I took the skiff and went on the beach to the nearest home where they had a telephone, a family by the name of Riser's. From there I called up Friday Harbor and asked to get in communication with the manager of the Fishermen's Packing Corporation, Mr. Morris, and I got in touch with him and told him what happened and for him to hurry and try to get the Coast Guard to come to Friday Harbor as soon as possible to take that man to the hospital; so that's my connection with your case.

Q. What, if anything, was done for the comfort of this man during the time that he was on the "Excel II" while you were on it?

A. The minute we put him on the boat we seen that he was laying on the mattress very comfortably; then, the sun was shining so we took a piece of canvas and rigged up the canvas right over his head so the sun wouldn't go on his head. And he also spoke to me and asked for a drink of water, which I give to him.

Q. At that time did you ever see the leg?

A. No, I never did, because he was covered with a blanket.

Q. Do you know who else helped take care of him during that time on the boat,—what members of the crew?

[fol. 366] A. On our boat, you mean?

Q. Yes.

A. It was a young fellow, deck-hand, myself, cook, and engineer,—we were all trying to do whatever we could for him.

Q. Your judgment is that the time that it took to get from the "Congress" to the telephone, or to Mitchell Bay, was how long?

A. Oh, about fifteen to twenty minutes, something like that,—fifteen or eighteen minutes. I couldn't say exactly how many minutes.

Q. Did the boat even dock there, or what?

A. No, just afloat,—stopped right alongside enough so I could jump off, and that's all there was to it.

Mr. Pierce: You may cross-examine.

Cross-examination.

By Mr. Wallace:

Q. Mr. Makovich, you were not a member of the crew of the "Excel II"?

A. No, sir; my capacity was to be on one boat one day, or part of a day, and then jump off on to another boat, and so on. I had to direct all of the buyers to see that they attended to all their purse seine boats and gather their fish, and help them in case they are in trouble, and so on. I had no particular boat to be on. I was on all of them.

Q. Where did you board the "Excel II" that morning?

A. Oh, in Kanaka Bay.

Q. Where is that with reference to Mitchell Bay, Mr. [fol. 367] Makovich?

A. Oh, that is about four miles up.

Q. How far from the place where the accident took place was it at the time the "Congress" signalled the vessel you were on, the "Excel II"? What was the distance away from the place where Mr. Anelich was injured and the place where the "Congress" signalled your boat?

A. Oh, I don't think it was more than 150 feet, or two hundred, probably; I couldn't say in that minute of excitement, but it wasn't any farther than that, I don't think.

Q. Did you know then how long they had had Mr. Anelich on board the "Congress"?

A. I don't have the least idea.

Q. What time was it, Mr. Makovich?

A. It was around about eight forty-five, or ten minutes to nine, or something like that, when we picked him up.

Q. Did you get your call through promptly?

A. Yes, I did.

Q. And who did you talk to?

A. I talked to Mr. Morris. First, I got the central in Friday Harbor, and then finally she connected me with Everett, and then I talked to Mr. Morris and told him what happened and asked him if he couldn't advise the Coast Guard cutter to come down there as soon as possible.

Q. Did you know about the Coast Guard?

A. Well, I didn't know the address. I thought probably by trying to call the Coast Guard from Friday Harbor would delay matters that much more, that's why I called Mr. Morris to get quicker action on it.

[fol. 368] Q. Did anybody get aboard the "Excel II" from the "Arizona"?

A. No, sir. There wasn't anybody on board there excepting the crew of the "Excel II" and myself.

Q. Did you know Mr. Anelich personally?

A. Yes, I knew him.

Q. How long had you known him?

A. Oh, that's something that is pretty hard to tell. I guess I know all the boys. I've probably known him for seven or eight years, something like that. I couldn't exactly tell you how many years but I knew him very well.

Q. Did he talk to you while you were there on the boat?

A. Yes, sir.

Q. How long were you on the boat with him, could you tell?

A. Oh, just fifteen or seventeen minutes,—whatever it took from the "Congress" to get to the float down there at Mitchell Bay.

Q. Do I understand that you were on the "Congress"?

A. Oh, no.

Q. You were on the "Excel II"?

A. Yes. I said from the time we got him from the "Congress" to the float.

Q. That would take how many minutes?

A. Between fifteen and seventeen minutes, something like that.

Q. How close did the "Congress" come to the "Excel II"?

A. Alongside.

Q. How fast does the "Excel II" travel, Mr. Makovich?

A. Well, now, that is something that I couldn't exactly tell you, but she travels a good deal faster than most of these purse seine boats, with the exception probably of one [fol. 369] that had as much power as she did.

Q. Well, how many knots per hour does she travel?

A. I couldn't tell you exactly. You'd have to time that. The Captain of the boat has to time that to know exactly how many miles, or knots, an hour she'd travel. I could give you something probably near it but not exactly.

Q. Give us an idea.

A. I think she'd go about nine, I think.

Q. Miles or knots?

A. Nine knots; something like that.

Q. Nine knots an hour?

A. That is my opinion. Of course, I'm not sure.

Q. That would be about ten miles an hour?

A. Pretty close to that.

Q. Do you know how far it is across to Oak Bay, Victoria, from Mitchell Bay?

A. I didn't measure that.

Q. Ever been over there?

A. Oh, I've been in Victoria about twenty-five years ago, or so, but I haven't been over there since.

Q. Did you talk to Mr. Anelich?

A. I did, just a few words.

Q. Did you see his wound?

A. No, I didn't.

Q. Didn't you uncover him at all?

A. Nobody touched him. He was wrapped up in a blanket, and so long as I was on the boat, that is the way he stayed.

Q. Was he bleeding?

A. I couldn't see that either.

[fol. 370] Q. Did you see any blood on the mattress?

A. No, not that I noticed any. If it was, it was probably on the blankets where I couldn't see.

Q. Was he suffering from pain?

A. Well, the only thing he told me, he says, "Give me a drink of water", he says, "I think I'm badly hurt". That's all he said.

Q. Had the boot been removed from his leg at that time?

A. Well, that is something I couldn't tell you. He was wrapped up in a blanket. Very likely it was. I didn't unwrap the blanket to see what was there at all.

Mr. Wallace: That is all.

Mr. Pierce: That is all.

(Witness excused.)

The Court: There having been no recess, the jury is now excused until half past one o'clock this afternoon.

(Whereupon adjournment taken at 11:50 o'clock A. M., until 1:30 o'clock P. M.)

[fol. 371] November 15th, 1934, 1:30 o'clock *A*. M.

The Court convened pursuant to adjournment; all parties present as heretofore; jury in the jury box.

KENNETH HAROLD STURDEVANT, called as a witness on behalf of the defendants, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Will you state your full name, please, doctor?

A. Kenneth Harold Sturdevant.

Q. And you reside where?

A. Friday Harbor, Washington.
Q. How long have you lived there?
A. About three years.
Q. What profession are you engaged in?
A. I am a physician.
Q. And you are a licensed physician under the laws of the State of Washington?
A. I am.

Mr. Wallace: We admit the qualifications of the doctor.

Q. Doctor, on the first day of August, 1933 did you give medical attention to one Mario Anelich?
A. I did.
[fol. 372] Q. Where was that medical attention given?
A. In my office at Friday Harbor.
Q. Do your records show the time that he came to your office, or that you first saw him?
A. No, I have no record of that.
Q. Have you any definite recollection of the time?
A. About ten-thirty or eleven A. M.
Q. Daylight saving?
A. Daylight Saving Time.
Q. Where did you first see him on that day?
A. I saw him on board a seine boat in the harbor at Friday Harbor.
Q. Doctor, what did you do when you first saw him?
A. Well, I examined this wound he had on his leg; put some bandages on it; got an ambulance, and took him up to my office.
Q. And did you treat him there at the office?
A. I did.
Q. Now, what was the nature of the wound? First, I will ask you, was the wound at the time you saw him on this boat covered or uncovered, so far as blankets first, and then clothing is concerned?
A. Well, there were several blankets over the man, and his trousers and his underwear were covering him.
Q. They had not been cut away?
A. No.
Q. State what was the situation as to any particles of either the underwear or clothing being in the wound?
A. As I recall, the underwear was intact; that is, so far as I could tell by looking at it. Of course, the underwear

[fol. 373] was laying right over the wound. The wound was open and the underwear was covering it.

Q. And the pants leg was in its usual position?

A. Yes.

Q. He had a fracture of the leg, doctor?

A. A fracture of the left leg, below the knee.

Q. How do you describe that fracture, doctor?

A. That is the open or compound multiple comminuted fracture of the tibia.

Q. Now, what do you mean by "comminuted fractures"?

A. That means the fragments are splintered.

Q. How does that compare with a simple fracture from the medical standpoint as to seriousness?

A. Oh, it is much more serious than a simple fracture.

Q. He was removed to your place and then after you got him to the office what did you do? Did you uncover the wound then?

A. Do you want to know in detail?

Q. So as to give us a fairly accurate picture of the wound.

A. The man on his leg on this side, he had a wound beginning about at the knee joint and extending down over the upper third of the leg on the inside. The skin was all torn loose and the muscles on the inside and back of the leg here were torn loose and were laying over this way. There was about five or six inches of the large bone of the leg exposed, fractured in many places.

Q. Did it protrude through the flesh of the leg?

A. The flesh was torn off of it; it was open and absolutely bare.

Q. That wound when you first saw him was not covered? [fol. 374] You uncovered it?

A. Yes.

Q. How did you uncover it?

A. Well, I cut the man's underwear up to get a look at it. After I saw what it was,—this was done down on the boat,—I put some bandage on it and covered it up and took him up to my office.

Q. What did you find, if anything, with reference to a tourniquet?

A. There was a tourniquet on the thigh above the knee, a tourniquet made of rope and put on in the regular manner, and it was cinched up tight.

Q. What was the evidence of having bled considerable?

A. There was a good deal of blood around on the clothes and the mattress he was lying on.

Q. What treatment did you afford him?

A. Well, I removed this tourniquet, and this allowed the wound to bleed very freely, most of it coming from the fractured bone, as I remember; so I reapplied the tourniquet, then I repaired this wound. There was a certain amount of dead tissue, not a great deal, dead muscle ends and tags of tissue that had to be cut away and removed. Then, I sewed these muscles back in position and sewed the skin over the whole thing.

Q. What about the veins and arteries, were any of them cut or bruised?

A. Well, naturally many of the small arteries and veins were cut because some of these muscles were torn through. The larger artery that supplies the leg was not torn, however.

Q. Any difficulty in stopping the bleeding?

[fol. 375] A. Well, the bleeding didn't entirely stop. Of course, practically all the bleeding was coming from these bone ends. You can't sew them. After I sewed this tissue over and put a bandage on, of course, that stopped most of the bleeding.

Q. Would you tell us, doctor, whether or not the operation as performed by you was major or a simple operation? Was the work done by you simple or major, from a medical standpoint?

A. Well, it's sort of between. An open fracture is considered a major operation, I guess, although the treatment I gave was very,—well, really just first aid treatment to stop the hemorrhage until he could get to a hospital.

Q. Did you cut away certain tissues?

A. Yes.

Q. That was necessary?

A. Yes, that was necessary.

Q. Did you have to sew up some muscles and things of that kind?

A. Yes.

Q. You had special equipment for that, I take it?

A. Just the ordinary equipment.

Q. Was the work that you did there, work that could have been done by a layman? Could it have been done by a layman with a first aid kit on a ship?

A. Not the work I did, no.

Q. Doctor, from the wound as you saw it, what is your opinion,—you knew that the man subsequently died from blood poisoning, or septicemia?

[fol. 376] A. Yes.

Q. From the wound that you saw and all that you know of, when would you say that the bugs, or bacteria, or whatever you call the blood poisoning, got into the system with reference to the time of the accident?

A. You mean when did the septicemia start?

Q. No. When did the bugs that resulted in the septicemia get into the system?

A. The germs went into the wound at the original time of the injury. The first ones went in at the time of the original injury.

Q. Now, those germs, together with any other germs that may have accumulated, are what finally resulted in the septicemia?

A. Yes.

Q. I will ask you, doctor, whether or not in your opinion as a physician, had first aid treatment been given by a kit made up as this kit is made up, or whatever there is in here, by a Captain of the ship who had never handled broken legs, such treatment would have prevented blood poisoning and septicemia in his leg?

A. Well, it is impossible to say that any treatment would have prevented septicemia in this wound. As this kit is so constructed it consists of a bottle of iodine and some bandages and some cotton. If this wound had been wrapped up after the injury it would have prevented some subsequent infection, but whether or not there would have been enough infection at the original injury to cause this septicemia, that cannot be said.

Q. Doctor, were the tissues injured?

[fol. 377] A. Yes, very much.

Q. Muscles were injured?

A. Yes.

Q. There had been a considerable loss of blood?

A. Apparently.

Q. What effect does the loss of blood have on the tissues?

A. Well, the loss of blood,—well, with a loss of blood there is a general decrease of vitality.

Q. What is the effect of a decreased vitality on the likelihood of blood poisoning setting in?

A. It increases the likelihood, of course.

Q. Would the application of iodine, without the cleaning up of the muscles and the flesh and the dead tissue that you found there, eliminate the germs from the wound?

A. Probably not. That is a question of which there is much debate. Personally, I don't think that anticeptics in a wound of this character,—that is, one application of even a strong anticeptic as iodine has a great deal to do with the amount of infection.

Q. Why not, doctor?

A. Well, in the first place the wound is bleeding freely, and that washes the anticeptic out and also washes germs out, too. And in the second place, in a single application of anticeptic in an extensive wound of this kind it does not allow the antiseptic to penetrate into all the portions of the wound. That is the chief reason. However, I say that is very debateable.

Q. What relation does shock have to the recovery of a patient where he is suffering severe personal injury?

A. Well, the greater the shock, of course,—well, the shock [fol. 378] can be considered as reducing the vitality the same as the loss of blood does. If the shock is severe the vitality goes down. If the shock is not severe there is not so much loss of vitality.

Q. Assuming a wound of this nature, doctor, cleaning out of that wound without the use of morphine, or anything to deaden the pain, would that add to the shock of the patient?

A. How do you mean,—cleaning it out by whom? Me?

Q. No. Cleaning it out by a man on a fishing boat where he did not have available anything to deaden the pain, morphine or opium. Would that produce shock, or otherwise, doctor?

A. Of course, pain does produce shock. Pain, though, in itself does not decrease vitality.

Q. What is the difference where the fracture is a simple break and where it is a comminuted fracture, so far as the possibilities of septicemia setting in at a later time?

A. Well, there is a great difference there. In a simple fracture with just one broken portion you have got just one place where the germs may enter the body, but if it is a

multiple comminuted fracture there are a great many more openings there where the germs can get in.

Q. What did you do after you had completed the work upon him? How long did he remain there?

A. He remained in my office until about four-thirty or five o'clock.

Q. During that time had he been given opiates?

A. He had altogether three-eighths of a grain of morphine.

[fol. 379] Q. State whether or not he was resting comfortably during that period?

A. After I had finished with this operation he was as comfortable as you'd expect. Of course, there was some pain during the operation.

Q. You did not undertake to repair the broken bones?

A. No; I put a splint on the leg to hold it still, that is all.

Q. Did you call anyone with reference to his transportation to any other place?

A. I called the United States Coast Guard.

Q. What time did you put in that call?

A. It was about two o'clock P. M.

Q. And at what time did the Coast Guard arrive?

A. About four-thirty or five.

Q. And he was then put on the boat?

A. Yes.

Q. You did not see him or have any further contact with the case?

A. No, he left my office in the ambulance and that is the last I saw of him.

Mr. Pierce: Cross examine.

Cross-examination.

By Mr. Wallace:

Q. Doctor, as I understand, the first thing you did was to bandage up his wound?

A. Down on the boat, yes, sir.

Q. How far is it from the boat to your office?

A. About two hundred yards.

[fol. 380] Q. And how long was it before you had him up to your office from the time you put the bandages on?

A. Ten or fifteen minutes.

Q. Now, when you called the Coast Guard do you know who you got in touch with?

A. Yes, I talked to Lieutenant Kinner, Commander of the Coast Guard base.

Q. Had anybody called him before about this?

A. He said someone had.

Q. Had they told him that this was a seaman, if you know?

A. I don't know.

Q. Did you tell him it was a seaman?

A. Yes, sir.

Q. Had you seen this man earlier, doctor, you would have put a bandage on just as you did, immediately, would you not?

A. Yes.

Q. Doctor, have you a telephone, and did you have on that day?

A. Yes.

Q. Your 'phone was listed in the book of the telephone company, was it?

A. Yes, sir.

Q. Do you know where Riser's place is near Mitchell Bay?

A. Yes.

Mr. Pierce: Objected to as not proper cross examination.

The Court: The answer may stand. It is preliminary, I take it.

[fol. 381] A. Yes, sir, I do.

Q. How long would it have taken you, doctor, to drive from your office to Mitchell Bay near Riser's place?

Mr. Pierce: Objected to as not proper cross examination.

The Court: Objection sustained.

Mr. Wallace: I will make him my witness for this question, Your Honor.

Mr. Pierce: I object to it because that has already been gone into in detail in the deposition counsel took.

Mr. Wallace: It has not been touched on in the deposition, Mr. Pierce; and besides, I understand that when the witness is here and testifies the deposition is not used, although the deposition has been read.

The Court: Well, of course, you may make this one your witness if you desire even though it is out of order.

Q. Did you have an automobile at that time, doctor?
A. Yes.
Q. And was it available early in the morning?
A. Yes, sir.
Q. How long would it have taken you to go to Mitchell Bay from your office or residence?
A. About twenty minutes.
Q. Do you know, doctor, whether or not there was an ambulance over there available at that time?
A. In Friday Harbor, yes. We used it.
Q. How long would it have taken the ambulance to go to Riser's place near Mitchell Bay?
[fol. 382] A. Well, a little slower; probably 25 or 30 minutes.
Q. Were you called on the telephone by anybody in connection with this man's injury on that day?
A. Why, I was called by somebody from the dock at Friday Harbor.
Q. I said by telephone.
A. Yes; but not from Mitchell Bay.
Q. I see.
A. From the dock up at Friday Harbor after the man came in.
Q. You were called after the man came in?
A. Yes, sir.
Q. Do you know who called you?
A. I haven't any idea.
Q. Where were you at that time?
A. My office.
Q. What is the danger doctor, if any, in leaving a wound open exposed to the air and whatever else it may be exposed to when it is injured as you observed this man was injured?
A. The danger is infection.
Q. You did not put this man under an anaesthetic, did you?
A. No.
Q. You have no hospital, have you?
A. No.
Q. To what extent was this man suffering pain, doctor, if you can tell?
A. Well, he was suffering great pain whenever his leg was moved or handled. While the leg wasn't being handled, while he was lying quiet, he didn't complain of pain.

Q. Did the man have a rubber boot on?

[fol. 383] A. No.

Q. Assuming, doctor, that that man when he was injured did have a rubber boot on, and that it was pulled off and not cut off, would that add to his pain?

A. Well, yes, that would be painful.

Q. And would it add to his pain to put him into a small skiff like they use for fishing?

A. Yes.

Q. And then transfer him to another boat?

A. Yes; any handling of that leg would cause quite a severe pain.

Q. You stated, doctor, that the germs got into the wound at the time the flesh was torn open at the time of the accident?

A. Yes.

Q. It is impossible, as I understand your statement, to tell to what extent they would get in then or later?

A. No; although it is inevitable that germs will get in a wound of that kind with dirty clothes.

Q. And as long as it is left open the more liability there is, the more opportunity for this infection?

A. Yes.

Q. The percentage, doctor, of injured persons who get septicemia is small, is it not?

A. You mean injuries taken as a whole?

Q. Yes.

A. Of all injuries of any kind?

Q. All injuries.

A. Yes, it is very, very small.

Mr. Wallace: I think that is all.

[fol. 384] Redirect examination.

By Mr. Pierce:

Q. Do you know what the percentage is in injuries of this kind, where a man was injured under the circumstances he was?

A. I couldn't say the percentage. I would say it would be quite high.

Q. What was this place out at Mitchell Bay, doctor?

A. Riser's.

Q. Some of that road is pretty rough?

A. Yes, the last mile or so is pretty rough.
Q. How far is it from the float to Riser's?
A. There is a dock there.
Q. Is there any road running from the float to his house, do you know?
A. About half way.
Q. Well, what is the distance from the float to the house?
A. A quarter of a mile.
Q. And the road only goes half way up to there?
A. I haven't been down there very many times, but that is as I remember it.
Q. Doctor, what pain would have been occasioned to this man if he was put into the cockpit of an airplane from a boat and shipped by airplane to Seattle, and then taken from the airplane by boat to an ambulance?
A. The pain would be the same no matter how he was handled. The handling of the leg causes the pain.

Mr. Pierce: That is all.

[fol. 385] Recross-examination.

By Mr. Wallace:

Q. Your conclusion is that the more handling there was, the more pain?
A. Yes.

Mr. Wallace: That is all, doctor.

(Witness excused.)

Dr. Leo Stewart Trask, called as a witness on behalf of the defendants, after being first duly sworn was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, please, doctor?
A. Leo Stewart Trask.
Q. Your business or occupation?
A. Physician.
Q. Where do you reside?
A. In Everett.
Q. Licensed physician?

A. I am.

Q. Engaged in the practice of your profession for how long?

A. Since I graduated in the year 1913.

Mr. Wallace: We will admit the qualifications of the [fol. 386] doctor.

Q. Doctor, you have heard the description of the injuries suffered by Mr. Anelich as given by Dr. Sturdevant, have you?

A. I have, yes.

Q. Will you tell us in the first place, or do you know, what the percentage is of comminuted fractures where the flesh is torn as this man's flesh was torn, and in which blood poison or septicemia result?

A. The percentage is very high in which infection takes place, perhaps as high as fifty or sixty per cent,—always depending upon the amount of destruction and the damage done to both soft tissue and bony tissue, and also depending upon the place where the wound is contracted. The mortality rate, of course, goes on down. The mortality from infection from a wound of that type goes down again in proportion to the amount of damage that has been done to the soft tissue.

Q. Assuming, doctor, the flesh would have been torn as it has been described here while the man was engaged in his work and wearing underwear and pants that he had been wearing while working on a fishing vessel, tell us whether or not in your judgment the cleaning up of that wound would be a major or minor operation, from a medical standpoint?

A. A major operation.

Q. What, if any, danger would be associated with the cleaning up of that wound by an inexperienced layman?

A. It would be disastrous.

Q. Why?

[fol. 387] A. Because the trouble an inexperienced man would get into both in bleeding and taking in more infection than already had been taken in.

Q. State whether or not the treatment of that wound by the bandages, or the iodine as shown in this first aid kit, which is marked Defendants' Exhibit Four, by a layman with that kit would have produced the danger of septicemia ultimately resulting?

A. Iodine, certainly, has an antiseptic value, and it is commonly used in all types of those kinds of wounds not because we expect it gets to the bottom of every wound and cleans out and kills all the germs taken into the wound, but it in a way inhibits their growth. There is not enough dressings here in the entire kit to make much of a protective covering for a wound the size of the one I have heard described.

Q. In other words, if I understand it, iodine is used then to prevent the propogation of the bacteria, is that the idea?

A. Yes; we don't expect to get in there and kill off all the germs that have been in the wound.

Q. And would the use of iodine alone, and without the cleaning up of the bruised flesh of the devitalized or injured tissues, prevent blood poisoning arising from the wound?

A. No.

Q. Assuming that there was heavy bleeding, then what effect would it have, doctor?

A. It would have less effect, certainly, because the bleeding would wash the antiseptic out.

Q. And the matter of the stopping of that bleeding re- [fol. 388] quires some technique, does it, or not?

A. Yes, indeed.

Q. Doctor, from what you heard of Dr. Sturdevant's testimony, and from what you know of this wound, I will ask you when in your judgment the bacteria, the poison, the bugs, or germs that finally caused this death, got into this man's system?

A. In all probability, I think almost positively, they got in at the time of the injury because from the time of the injury, as I understand it, to the time he reached Dr. Sturdevant, there was nothing touched about the wound; nobody had their hands on the wound; the same clothing that the man had on was left covering it, thus protection to the wound; no new clothing was put on; nobody's dirty hands had been in it, so I am almost certain they got in at the time of the injury. The wound stuck out in his pant leg, and there was nothing except the dirty clothing that he already wore, that touched it.

Q. In your judgment, doctor, what is the proper course of action where a man suffers this sort of injury? What is the first thing to be done,—get him to a doctor, or what? How important is it?

A. The most important thing is not to get him to a doctor but to stop the bleeding. If a man has some severely lacerated blood vessels it is more important to stop the bleeding. An ordinary tourniquet will stop the bleeding very well, and can be left on with perfect safety for at least one hour, and perhaps longer.

Q. Assuming a tourniquet has been applied and the bleeding stopped, or delayed, what then would be, in a [fol. 389] wound of this sort, a comminuted fracture of the leg, in your judgment the proper course to pursue in order to prevent further injury?

A. Absolute immobilization of the injured portion; and then to prevent shock by minimizing pain, which you have done by immobilization, and by keeping the patient warm.

Q. With reference to the warmth, is there any danger in this kind of injury associated with the removing of a covering or the clothing from a wound?

A. The clothing around the wound, it depends on how extensive the clothing that is to be removed. Unless something is available to immediately replace the covering, why it is better the original covering should be left on, and not a fresh dirty covering put on, if that is what you mean.

Q. Doctor, in your judgment, would it be safe or advisable for the average layman, or a fisherman on a fishing boat, to have undertaken either the setting of this leg or the cleansing of this leg with the facilities that have been called to your attention here?

A. It would be absolutely inadvisable.

Mr. Pierce: Cross examine.

Cross-examination.

By Mr. Wallace:

Q. Doctor, in your opinion, would the wearing apparel directly over this wound be a protection to it or a hindrance?

A. It would be a protection to it unless some more cleanly [fol. 390] or antiseptic article was available to replace it immediately. It would certainly be better to leave it there than to take the dirty underclothing off and put something else dirty in there.

Q. Would you prefer to take off the dirty clothing and leave it without anything on than leave it as it was?

A. I would prefer to have the dirty clothing over it.

Q. Why?

A. Because the dirty clothing already is in the wound, and if you leave it unprotected entirely it will certainly get, and there is going to be certainly, some fresh dirt that is going to pile into the wound. In addition to that, it keeps the extremity warm, retains the bodily heat.

Q. It would be preferable to have bandaged it up, would it not?

A. Yes, sir; preferable to have ample dressings.

Q. And that, you think, is true regardless of whether an antiseptic is used or not?

A. Yes, sir. Certainly it is advisable to put on clean sterile dressing.

Q. What is the amount of iodine in that box that you have referred to there, Defendants' Exhibit Four?

A. It is a four ounce bottle.

Q. Are you familiar with first aid kits, doctor?

A. Yes, various types.

Q. What we have been referring to as Defendant's Exhibit Four is really Defendants' Exhibit Three. Examining Defendants' Exhibit Three, tell the jury whether or not that is complete, or incomplete, or just ordinary?

[fol. 391] A. It is an ordinary first aid kit that I have seen. It contains about the same thing that usually first aid kits contain, iodine, antiseptic, a small roll of sterile gauze, small adhesive tape, and some bandages. It is largely for minor injuries.

Q. Doctor, assuming this wound to be from just the level of the upper part of the knee down on the under part of the leg, the upper part of the lower limb, a distance of eight inches torn off, six inches of it exposed clear to the bone and the flesh laid aside, is there enough cotton in that first aid kit, Defendants' Exhibit Three, and bandages to properly cover and take care of that wound for one dressing?

A. Yes, there is enough gauze to cover the wound over of that description.

Q. And in your opinion, doctor, was it advisable to make that application immediately upon the man's injury? Had you been on the vessel, doctor, with no equipment other than what you are now holding in your hand, which is Defendants' Exhibit Three in this case, what would you have done with it, and how soon would you have done it, if at all?

Mr. Pierce: That is objected to as incompetent, irrelevant and immaterial. You must assume he was a fisherman without knowledge of medicine, not that he is a doctor.

Mr. Wallace: All right.

Mr. Pierce: There wasn't any doctor there. To get his knowledge he spent years and years in medical college.

[fol. 392] Mr. Wallace: I concede you are right, Mr. Pierce, and withdraw the question.

Q. The earlier that first aid kit could have been used, the better, would it not, doctor?

A. Yes.

Q. Have you seen the X-ray pictures of this wound?

A. I have not, no.

Q. I wish you would look at them. (Exhibiting X-ray pictures to witness).

Q. That is the one before reduction, and this is the one after reduction.

A. Yes, sir, I see them.

Q. Is it extensive or not?

A. Extensive. The fracture is extensive. The reduction is a very good reduction, I would say,—excellent reduction.

Q. Had this wound been bandaged up with the material that is in the first aid kit, Defendants' Exhibit Three in this case, in your opinion would it have prevented germs from getting into the wound, or what is sometimes used in the medical profession, as secondary infection?

A. No, it couldn't have prevented it. My belief is that the germ got into the wound at the original injury.

Q. Would it have kept germs out at a later time?

A. It would have kept additional germs from getting in.

Mr. Wallace: That is all.

Redirect examination.

By Mr. Pierce:

Q. Doctor, with a severe fracture of that kind, from a [fol. 393] medical standpoint which would be preferable, first aid treatment by a first aid kit by an amateur and a layman, or rushing a man to the doctor?

A. I just didn't get that question, as a choice between the two? How soon, did you say, to the doctor?

Q. Rus-ing the patient to the hospital under the circumstances revealed to you in this case?

A. First aid of some type certainly was advisable.

Q. And how important was it to get him to a doctor?

A. That was very important, too,—somebody who could take proper care of his wound. But if a long time must elapse before you could get him to a doctor it was essential that the hemmor-hage could be controlled.

Q. That is, to stop the bleeding?

A. Yes.

Mr. Pierce: That is all.

Recross-examination.

By Mr. Wallace:

Q. And to cover the wound with clean bandages is essential, isn't it?

A. As soon as possible to get the wound cleaned.

Q. And doctor, if you know that you cannot reach a doctor within two hours and a half, then you would resort, you think, to the first aid kit as well as getting him to the doctor?

A. Somebody who is skilled in using it, yes.

Q. Well, it would not require a physician and surgeon to use this kit here, Defendants' Exhibit Three, would it?

A. Well, a well-trained first aid man could use it very [fol. 394] intelligently.

Mr. Wallace: That is all.

Redirect examination.

By Mr. Pierce:

Q. And an untrained first aid man might increase the infection?

A. Yes, if they get their dirty hands in the wound.

Mr. Pierce: That is all.

(Witness excused.)

EDWARD STEVENS, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, Mr. Stevens?
A. Edward Stevens.
Q. And you live where?
A. In Everett.
Q. And now attending the University of Washington?
A. Yes.
Q. What were you doing on the first of August, 1933?
A. I was employed aboard the "Excel II", cannery ten-
[fol. 395] der, for the Fishermen's Packing Company.
Q. Were you working in that capacity at the time an injured man was brought to the boat from the "Congress"?
A. Yes.
Q. How was he removed from the "Congress" to the "Excel II", by boat, or were the two boats brought together?
A. The boats were brought together.
Q. How was he removed from one boat to the other?
A. He was lifted across.
Q. Was there anything under him?
A. There was a mattress under him.
Q. He was lifted aboard on a mattress?
A. Yes.
Q. Now, what was done for him on the "Excel II"?
A. Well, we made him as comfortable as we could and kept him warm, and put a shade over his eyes so the sun would not beat down on him, and Mr. Makovich got off the boat at the float at Mitchell's Bay and we continued to Friday Harbor.
Q. Did you see the wound at all?
A. Not until Dr. Sturdevant opened it up.
Q. But until that time you had devoted your attention to making him comfortable?
A. Yes.
Q. Did he ask for water?
A. Yes.
Q. Was he given water?
A. Yes.

Q. What, if anything, did you do to hold the leg immobile, or propped up?

[fol. 396] A. The cook got a lot of kindling wood and small pieces of wood to hold it up in a position to ease the pain, according to what he wanted.

Q. And you continued to do that until such time as he was delivered to Dr. Sturdevant at the dock?

A. Yes.

Mr. Pierce: Cross-examine.

Cross-examination.

By Mr. Wallace:

Q. What time did he come aboard the "Excel II"?

A. It was in the morning, I should say about,—oh, before nine o'clock.

Q. And where was the "Excel II" at the time he came aboard?

A. We were down a short distance out of Mitchell Bay on the Coast line.

Q. How far were you out from the dock at that time?

A. The dock?

Q. That is, the dock where you let Makovich off?

A. He got off at the float; there was a float there.

Q. How far were you away from the float?

A. We were probably, I should say, fifteen minutes.

Q. Fifteen minutes?

A. I don't know exactly how far. I was pretty busy with the man and I lost count of time.

Q. Did Mr. Anelich have his boots on at that time?

A. As I recall, he did not.

Q. What?

A. As I recall, he did not have them on.

Q. Had you known Mr. Anelich before?

[fol. 397] A. Only as I came in contact with him in our business with the "Arizona". I had seen him and talked with him as much as I had talked to the rest of the boys on the ship.

Q. You were not personally acquainted with him?

A. Not personally, no; no more than I was with the rest of the men.

Q. After you took him on board the "Excel II", the vessel then went into the float and put Mr. Makovich off at the float?

A. Yes.

Q. And that, you think, took you about fifteen minutes?

A. I would say so but I'm not sure.

Q. Did anybody from the "Arizona" come with him on to the "Excel II"?

A. No; they might have come aboard but they didn't stay.

Q. Did anybody give you any directions as to what to do for Mr. Anelich?

A. Only the Captain of the boat.

Q. The Captain of what boat?

A. My boat.

Q. The Captain of your boat?

A. Yes.

Q. You had no directions from the Captain of the "Arizona"?

A. Well, when,—we were instructed to take Mr. Anelich to Friday Harbor, or to take Mr. Makovich and drop him off. Mr. Makovich was aboard and in charge,—a Captain was in charge too. I was only a deck-hand and receiving orders.

Q. No one from the "Arizona" came aboard your vessel, and if they did they did not stay, they went back?

A. Yes.

[fol. 398] Q. You took this man from the "Congress" did you not?

A. Yes, sir.

Q. Do you know what time you arrived at Friday Harbor?

A. It was in the forenoon; I can't say exactly. Probably would be just before noon.

Q. Just before noon?

A. It might have been about eleven.

Q. Who called the doctor then, Mr. Stevens?

A. I haven't any idea.

Q. Did someone from your vessel call him?

A. I don't know; I wouldn't be prepared to say. We were all busy at the time.

Q. What were you busy doing?

A. I was watching that there man; we all have our own parts to do on the boat. There was five of us.

Q. I am asking you what you were doing?

A. I was watching after the man, making him as comfortable as I could.

Q. And you stayed with him from the time he came on board until he was put ashore?

A. Yes, sir.

Q. Was he suffering great pain?

A. Yes, he seemed to be.

Q. Did he talk to you?

A. Not very much.

Q. Did he tell you what to do for him at any time?

A. He just asked me to adjust his leg into different positions that would ease the pain, and for a drink of water occasionally.

Q. Was he bleeding a great deal?

[fol. 399] A. I haven't any idea; I didn't see the wound at all.

Q. Did you see any blood at all?

A. No.

Q. How long after you arrived at the dock before you put him ashore?

A. The doctor came down. While I don't like to say exactly how long it was, it was probably twenty minutes, fifteen or twenty minutes. The doctor came down and was there all the time.

Mr. Wallace: That is all.

Redirect examination.

By Mr. Pierce:

Q. During that fifteen or twenty minutes Dr. Sturdevant was there?

A. Yes.

Mr. Pierce: That is all.

Recross-examination.

By Mr. Wallace:

Q. How long after you arrived before the doctor came aboard the vessel?

A. He came down in probably five minutes.

Q. Somebody had to call him after you got in, did they not?

A. I don't know.

Q. You don't know that?

A. No, I don't know anything about his being called, or anything.

Mr. Wallace: That is all.

(Witness excused.)

[fol. 400] MARGARET GROSS, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. State your full name, please.
A. Margaret Gross.
Q. Where do you live, Miss Gross?
A. Friday Harbor.
Q. You work?
A. Not now.
Q. What were you doing on August first, 1933, if anything?
A. I was telephone operator.
Q. At what place?
A. Friday Harbor, Washington.
Q. In charge of local or long distance calls, or both?
A. Both.
Q. Did you bring with you the records of the calls, the various calls that went from Friday Harbor to the mainland on that particular day?
A. Yes, sir, I did.
Q. Those are what? Who made those slips up?
A. Well, I made up two of them and the other operator made two.
Q. Have you any record there of a call made by Makovich?
A. Yes, I have.
Q. What is the time of that call?
A. Mr. Makovich called Everett at 10:40 in the morning, [fol. 401] that would be Daylight Saving Time; that would be 9:40 Standard Time.
Q. Now, then, what is the next call that you have?

A. The next call the other operator had at noon, and it was a public office call, that would be from the booth at Friday Harbor.

Q. What was that?

A. It was Mr. Mardesich calling Everett, Blue 1332, Mardesich.

Q. And was that call shown as completed?

A. Yes.

Q. By the way, do the records show whether the calls were completed?

A. Yes, they do.

Q. How do they show that?

A. Mr. Makovich's call and Mr. Mardesich's call were completed and they had to be okehed, and when they are okehed we connect them up with their party and then they talk.

Q. When is the next call that you have there?

A. The next call?

Q. The next call consecutively in the day?

A. It was a public office call and we don't have the names.

Q. But from what public office to what public office?

A. That was the public office; they called the Port Townsend Coast Guard at 1:55 Daylight Savings Time.

Q. That would be 12:55 Standard?

A. Yes.

Q. And was the connection made at that time?

A. Yes, they talked two minutes.

[fol. 402] Q. That was from the pay station to the Coast Guard at Port Townsend?

A. The pay station is right in the telephone office.

Q. And it went directly to Port Townsend?

A. No; they go through Bellingham.

Q. Well, it arrived in Port Townsend eventually?

A. Yes.

Q. Now, the next call.

A. The next call I had was Dr. Sturdevant called Port Townsend, Commanding Officer, at 2:08; that would be eight minutes past two, Daylight Savings Time.

Q. Now, the first call that you have into Everett was at 10:40, am I right?

A. Ten-forty, Daylight Savings.

Mr. Pierce: That is all.

Cross-examination.

By Mr. Wallace:

Q. What did you say the Everett number was of the 10:40 A. M. call?

A. Mr. Makovich, he called Main 1027, Morris, Mr. Morris.

Q. And where did that call come to your station?

A. It came from Number 253, and that was Mr. Riser of Mitchell Bay.

Q. And then you got one to a Blue something, in Everett.

A. I think the number was Blue 1332, Mardesich.

Q. Who called that on your end of the line?

A. It was a Mr. Mardesich put the call in but I didn't have it; the other operator had it; but it shows here.

[fol. 403] Q. You were not on duty at that time?

A. Not, it was at noon.

Q. Does it show whether it was Peter Mardesich or Antone Mardesich?

A. No; all it has is "Mardesich calling Mardesich".

Q. Well, that was a charge call, was it?

A. It was a reverse charge, yes.

Q. And charged to the Everett number?

A. Yes.

Q. Now, the time of that call was what?

A. 12:33, Daylight Savings Time.

Q. And then your next call was by whom?

A. The next call, it was a cash call; it was paid at the office so of course we didn't have any name,—just a pay station in the public office.

Q. Were you on duty at that time?

A. Yes, I was.

Q. Did you see the man at that time?

A. Yes, I did. He was short and dark.

Q. Do you recognize him in the court room now?

A. It was Mr. Mardesich; he is back there.

Q. Pete Mardesich, will you stand up if you are in the Court room? (Peter Mardesich does as requested.)

A. I'm quite sure that is the one that put the call in.

Q. That is the man that called. And then your next call was when?

A. At 2:08.

Q. 2:08; that was by Dr. Sturdevant?

A. Yes.

Q. Now, that call at 12:33 went to Port Townsend?

[fol. 404] A. I beg your pardon?

Q. It went to Port Townsend, didn't it, the 12:33 call?

A. No; that is to his home.

Q. That is to his home in Everett, or his father's house?

A. Yes, I suppose it was.

Q. Now, when did you have the first call to Port Townsend?

A. At 1:55.

Q. And who made that?

A. That was that public office call.

Q. What do you mean by "public office call"?

A. Pay station.

Q. That is right in your office?

A. Yes, sir, just a small office.

Q. And did you see the party who made that call?

A. Yes, that is the call I just told you about, Mr. Mardesich.

Q. I thought that was the call that was at 12:33.

A. No, the call at 12:33 was Mr. Mardesich calling Blue 1332, Mardesich. I didn't have that call.

Q. Yes, I see. This 1:55 is the first call that you had from Mr. Pete Mardesich?

A. Why, yes; it was the one to the Coast Guard.

Q. And that was to the Coast Guard?

A. Yes, sir.

Q. Had Mr. Mardesich been in your office that morning before endeavoring to get the Coast Guard?

A. I really don't remember; there are so many coming in and out of the office all the time it is hard to remember.

Q. Have you searched your records in your office over there to ascertain whether there were any other calls to [fol. 405] the Coast Guard other than the one at 1:55 and the one at 2:08?

A. These are the only ones I have. Mr. McKenzie, the owner, gave these to me.

Q. By what company were you employed?

A. It was the Inter Island Telephone Company.

Q. Is that the only telephone company on the island?

A. Yes, it is.

Q. Do you handle telegrams, too?

A. Yes, we do.

Q. There is no other communication off of the island other than this company of yours?

A. No, sir.

Q. And that works through Bellingham?

A. Yes, sir.

Q. You are connected with all stations ashore on mainland?

A. Well, we are connected with Bellingham, is that what you mean?

Q. And you are connected with the Pacific Telephone & Telegraph Company, are you not?

A. Yes, sir.

Q. And you have through connection to Everett, Bellingham, and Seattle?

A. Bellingham is our main station.

Q. Are you able to call Victoria from your place?

A. Only through Bellingham.

Q. I mean, are you able to call it?

A. Yes.

Q. Did you have at your office over there a telephone book of the Pacific Telephone & Telegraph Company?

[fol. 406] Mr. Pierce: Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

The Court: It is not proper cross-examination.

Mr. Wallace: I would like to make the witness my witness.

The Court: Well, you may.

Q. Miss Gross, do you identify this?

A. This did not come from the Friday Harbor office, did it?

Q. No. I don't think so. I am just asking if you can tell what it is, if you know what it is?

A. It is a telephone directory for Seattle.

Q. Yes. Did you have one of those over there in your office, Miss Gross?

A. Surely.

Q. The one that was in force during the first day of August, 1933?

A. We had one whenever they put a new one out.

Q. You had then a current directory?

A. Sure.

Mr. Wallace: We will have this marked.

(Having telephone directory marked as exhibit.)

Q. Was it available for use by the public?

A. Yes, sir.

Q. Where is this plaintiff's Exhibit "K" exhibited in your office; that is, where in the office of the Island Telephone Company? Where did you keep it?

A. Well, we have a table right outside the switchboard that we have the different directories on, and if anyone wishes a directory they ask for the one they want.

[fol. 407] Q. Did Peter Mardesich on the first day of August, 1933 ask you to see this book?

A. I don't remember.

Q. Did he ask to see Plaintiff's Exhibit "K", or one similar to it?

A. I don't remember.

Q. You don't remember that?

A. No.

Mr. Wallace: We offer it in evidence, if the Court please.

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial, and having no probative value whatever in this case.

The Court: Well, I fail to see how the exhibit itself holds any probative value.

Mr. Wallace: It is part of our general case, and inasmuch as I have made the witness my own witness she has identified it; it is the book in which Mr. Kinsey says that they had advertised their air service, and I wasn't able to pick one up; they are destroyed annually or as soon as they are finished a new book comes out; we were not able to get one until today, and therefore we had no opportunity to have it identified before. We are offering it to show that the air service of the Gorst Transport Inc., is listed in it and the other air lines, and this book was available to these men. It is a question of fact for the jury as to whether or not they should have availed themselves of that means of transportation.

Mr. Pierce: How can it have any probative value, may it please the Court, unless it is shown that these men knew of [fol. 408] the book; that these men knew who Gorst was. If I wanted to call the Gorst Airplane Company I have got to know Gorst's name. What good does it do that it is under the name of Gorst in a book of that size unless it is further proved that the man he thinks they should have called knew it was there?

The Court: I sustain the objection.

Mr. Wallace: Now, if the Court please, I charge in my complaint in this case that these telephone numbers were advertised; this airplane business was advertised, and their telephone number was listed; and that the defendants in this case knew, or by the exercise of reasonable care could have known, those numbers and could have called them. Now, it is not necessary to introduce the whole book, but I would like to introduce Page five, that part of it which relates to airplane business, and I offer that in evidence in this case.

Mr. Pierce: I am objecting to that as incompetent, irrelevant and immaterial. Counsel says that he alleges that we knew. Has he proved it?

Mr. Wallace: Or should have known.

Mr. Pierce: Or should have known. Why, if I live in Everett, why should I know what is in a Seattle telephone book?

The Court: I do not think it is very material in this case whether it was advertised in the telephone book or whether the defendant knew there was such. The real question is whether there was airplane service, and whether reasonable care required that it be availed of.

Mr. Wallace: And now we have a right to show the means [fol. 409] of availing themselves of that. Suppose there was no 'phone; they couldn't call. We want to show that they could have called them; that they had a 'phone and it was listed and it was advertised.

The Court: Well, I will admit the page in evidence.

Mr. Wallace: That is all.

Mr. Pierce: That is all.

(Whereupon page of telephone directory referred to was received in evidence and marked Plaintiff's Exhibit "K".)

(Witness excused.)

Mr. Pierce: Unless you want those original slips, Mr. Wallace, I agreed with the Manager to send them back, unless you want them introduced. I am responsible for them getting back.

Mr. Wallace: They are of no value so far as I can see, Mr. Pierce. That is, I mean there is no value to keep them here.

[fol. 410] J. O. MORRIS, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Will you give us your full name, please, Mr. Morris?
A. J. O. Morris.
Q. Your business, please?
A. Manager of the Fishermen's Packing Corporation.
Q. Residence where?
A. Everett.
Q. Where is the location of your office?
A. Foot of Bond Street.
Q. And the telephone number?
A. Main 1027.
Q. Is that the same number that you had in 1933, do you know?
A. Yes, sir.
Q. Did you Mr. Morris, on August 1, 1933 receive a call from Lee Makovich? First, I will ask you, who is Lee Makovich?
A. He is President of our company at the present time; and in August of that year he was what we called the head fish buyer. He was in charge of the buying of fish.
Q. What generally is your relationship with the men fishing on the Sound in the regular purse seine boats?
A. I didn't get that.
Q. What is your relationship? What are your contacts [fol. 411] with these men, the fishermen?
A. Our company has approximately ninety stockholders, all of them owners of purse seine boats and fishermen.
Q. Mr. Makovich was working for you on August 1st, 1933 as buyer, you say?
A. Yes.
Q. Did you receive a call from him that morning and if so, from where?
A. I received a call from him through the Friday Harbor telephone office. I think Lee told me at that time he was at Mitchell Bay, that is on the San Juan Islands.
Q. With reference to what?
A. He told me that one of the crew on the boat "Arizona" had his leg broken.

Q. And what, if anything, did he request you to do?

A. He wanted me to get in touch with the Coast Guard at Port Townsend, or Seattle, or wherever we could, with the idea of getting him to some hospital as quick as possible.

Q. And did you call the Coast Guard?

A. I put in a call for the Coast Guard but knowing that I might not be in the office when they called back I turned that call over to Mr. Suglian to handle it from then on.

Q. Is Mr. Suglian here?

A. Yes, sir, he is here.

Q. And then you left the matter with Mr. Suglian, did you?

A. Well, not altogether, because while he was to take care of it in case I wasn't there, yet we consulted from time to time how the Coast Guard people were cooperating.

Q. Did you have more than one call put in, do you know?

A. Yes, more than one. We had a little difficulty in [fol. 412] locating them.

Mr. Pierce: Cross-examine.

Cross-examination.

By Mr. Wallace:

Q. Did you ever talk to the Coast Guard, Mr. Morris, on that day?

A. No, I didn't, only in relation to talking to Mr. Suljin; I wasn't in the office when we finally got them on the 'phone.

Q. Were you in communication at any time with Peter Mardesich, or his father?

A. I think I was. I think I was in conversation with one of them.

Q. About what time?

A. I couldn't say as to what time it was.

Q. Well, was it in the forenoon or afternoon?

A. I can't recall that.

Q. What did you talk about?

A. Well, as I recall it, Tony told me that this man's leg was broken and he wanted a Coast Guard cutter as quickly as possible, or something to that effect.

Q. Did he tell you to get a Coast Guard vessel?

A. I don't think that he told me what I should do excepting that he seemed to be very much disturbed and wanted

something to be done, or anything to be done as quickly as possible.

Mr. Wallace: That is all.

(Witness excused.)

[fol. 413] MARIO SULJIN, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, please?
A. Mario Suljin.
Q. Your business?
A. I am assistant to the Manager of the Fisherman's Packing Company.
Q. How long have you been engaged in that business?
A. Since 1930.
Q. Were you so engaged on August 1st, 1933?
A. Yes.
Q. State whether or not you called anybody in connection with this Friday Harbor accident on that morning?
A. Yes, I did. I called Port Townsend.
Q. Who did you call at Port Townsend?
A. First I called up the Coast Guard, and they give me,— I believe, the central give me the wrong number, and they referred me to Seattle; then I looked in the Seattle directory and I couldn't find those people they told me to call, so I put another call back for Port Townsend to get me the Coast Guard proper, the ones to take care of the Coast Guard cutters, to rush to the aid of the fishermen out there. Finally I have somebody on the other line, I don't recall his name, and he says they were going around the corner [fol. 414] and see the Captain and call me right back, and I said to be sure and call me right back so I will know about what time the Coast Guard leaves so I can wireless outside for him to get these boys the news when the boat is going to be there. I think that was somewheres around eleven o'clock in the morning, or something like that.

Q. You were working on what time, Standard or Daylight?

A. Daylight. And by that time I didn't get any call back from Port Townsend—it was my lunch time and I went to lunch, and the minute I came back I think it was somewheres around one, I would say about one o'clock or thereabouts, I called back Port Townsend and they had already told me that the Coast Guard is on the way, and that was so far as I handled the call.

Q. Do you recall what time it was when you put in the first call?

A. I would say it was somewheres before eleven o'clock in the morning.

Q. Daylight Savings Time?

A. Exactly.

Mr. Pierce: Cross-examine.

Cross-examination.

By Mr. Wallace:

Q. And when did you get in touch with them?

A. I got in touch with them, oh, maybe after I finished fighting with the centrals here and there, I guess about ten minutes afterwards.

Q. And then the fellow over at Port Townsend said he had to go around the corner to see somebody?

[fol. 415] A. Yes, to see the Captain of the cutter to go out, see?

Q. And then you went to lunch in the meantime?

A. Yes.

Q. And you came back about one o'clock?

A. Yes; because I told him to call me back when the Coast Guard is going to leave, and to call me collect, see? So, we were to pay on this side of the line, and they will give me the message when the cutter leaves.

Q. What did you say to the Coast Guard man?

A. I told him that there is a man hurt on one of the fishing boats by the name of "Arizona," and that the man is in Friday Harbor at the time, up at the doctor's office. You see, they took him to Friday Harbor to the doctor. And told them to pick up that man and take him to Seattle, the Marine Hospital, as soon as they can do it.

Q. You are sure that you talked to the man at Port Townsend?

A. I sure did talk to somebody on the other end of the line.

Q. About eleven o'clock?

A. Something about that time. The 'phone records will show you exactly the minutes, you know.

Q. Did you ascertain the exact minute?

A. Well, I cannot ascertain the exact minute, no.

Q. You knew you were coming up here to testify, didn't you, Mr. Suljin?

Mr. Pierce: I will tell counsel that I have sent for the record so there won't be any dispute about that.

Q. Do you know who you talked to over there at Port Townsend?

[fol. 416] A. I don't know his name. I don't recall it. He told me what his name was but I don't recall it.

Q. You don't know what he had to do with it?

A. Oh, yes; I guess he was the fellow that was in charge of the 'phones over there.

Mr. Wallace: That is all.

Mr. Pierce: That is all.

(Witness excused.)

Mr. Pierce: Now, that is all I have on this phase of the matter. I have sent down for those slips, Mr. Wallace.

Mr. Wallace: I have no desire to have somebody come up here from the telephone company and say this is their record.

The Court: There will be a recess of ten minutes. Jurors, you are barred for a time from the jury room as there is another jury in there. You will have to make yourselves as comfortable as you can outside of that jury room.

(Recess.)

[fol. 417] JOHN BUCOKA, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, please?
A. John Bucoka.
Q. And your business?
A. Fisherman.
Q. How long have you been a fisherman?
A. Twenty-two years.
Q. You live here in Everett?
A. Yes, sir.
Q. Do you own or operate your own boat?
A. Yes.
Q. Do you go out as Master of the boat?
A. Yes, sir.
Q. Have you been here when there was a discussion about a board fixed on the winch for the purpose of holding the clutch?
A. Yes, sir.
Q. What is the name of your boat?
A. "Silverland."
Q. Do you have such a board?

Mr. Wallace: I object to that as leading.

Q. State whether or not you have such a board on your ship?
A. Yes.
Q. How long have you had it there?
[fol. 418] A. Since it was built.
Q. What is the purpose of that?
A. Just to hold the lever.
Q. Is it to keep the clutch from slipping?
A. Yes, sir.
Q. Do you understand it is to keep the clutch from throwing out? Just tell us whether or not you use that when you are pulling in the purse line?
A. When you pull in the purse line?
Q. You understand my question?
A. Yes.
Q. On your boat.
A. Sometimes we do and sometimes we don't.
Q. Do you know of other boats on which that is used?
A. On other boats, you mean?

Q. Yes, of your own knowledge.
A. Oh, oh lots of boats they use it.

Mr. Pierce: Take the witness.

Cross-examination.

By Mr. Wallace:

Q. Just one question. You are a son-in-law of Mr. Mardesich, are you not?
A. No, sir.
Q. Brother-in-law?
A. No, sir.
Q. Are you any relation to Mr. Mardesich?
A. No, sir.
Q. What is the name of your vessel?
A. "Silverland."
[fol. 419] Q. And what part do you own in it?
A. I own half the boat.
Q. And who owns the other half?
A. Mr. Martinis.
Q. What is his first name?
A. Vincent and Paul, two brothers.
Q. He is a son-in-law of Mr. Mardesich, is he not?
A. No, sir.
Q. Is he related to him?
A. No, I don't think so.

Mr. Pierce: Object to this as incompetent, irrelevant and immaterial.
The Court: It will be sustained.
Mr. Wallace: That is all.

(Witness excused.)

George Brajcich, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. State your full name.
A. George Brajcich.

Q. What is your business?

A. Fisherman.

[fol. 420] Q. How long have you been fishing?

A. Since 1917.

Q. Where have you fished?

A. On Puget Sound.

Q. On boats, or otherwise?

A. On purse seiners.

Q. Were you working on the "Arizona" during the fishing season of 1933?

A. I was fishing in 1932 in the fall and then I fished in 1933 in the summer.

Q. On what boat?

A. "Arizona."

Q. Were you on that boat at the time Mr. Anelich was hurt?

A. Yes, sir.

Q. What was his job, and what was your job?

A. His job was on the winch on the stern and my job was on the bow.

Q. How long did you work that summer?

A. Well, we went out, I think, on the 27th of June.

Q. Did you continue to work on the boat all summer?

A. Yes.

Q. What job did you do all the time?

A. On the winch.

Q. Tell us whether or not Mr. Anelich worked on the other side during that time?

A. Yes, sir.

Q. Can you tell us about how many times while he was working there you went through the operation of pulling in the net?

A. What do you mean? How much on the drum?

[fol. 421] Q. Yes; how many times you did it during the season before he was hurt?

A. About four.

Q. During the whole season?

A. Well, you mean the sets we make that day?

Q. Yes, in a day.

A. About four, average.

Q. About four average a day?

A. Yes.

Q. And that would be six days a week throughout the season?

A. Yes, sir.

Q. Tell us whether or not you always did it the same way, or did you change?

A. Always the same way.

Q. Now, you can come down here and show us just where you were when the accident occurred, which side you worked on and which side Mr. Anelich worked on.

A. Well, I was on this side right close to the mast, and he was right here (indicating on model).

Q. Now, what was your work? What was your job in connection with that?

A. Well, when we get the purse line, then I put it three times, or four times, like this (indicating); and he does the same on this side, and then we coil the rope like this (indicating), until the rings come to the davit.

Q. You both do the same thing?

A. Yes.

Q. Then when the rings get to the davit what happens?

A. Then I get the sling. Then we go through this right [fol. 422] here (indicating), and then put the tackle on.

Q. What is that for?

A. This is for to lift the rings and the line.

Q. Now, when do you take the rope out of the block?

A. When we got the tackles on this line.

Q. Can you take those ropes out until you take the sling up?

A. You've got to take the sling out of the tackle first, because this rope is tight like this (indicating), and then this stays still. Then when we drop this block, then one fellow holds the rope like this (illustrating), and then I went right here and take this out and then I went right to this davit to take the line out of this block.

Q. When you do that is there any strain on the rope when you pull it out of the block?

A. Not on this purse line; it is a strain on this tackle.

Q. Now, on the day this accident happened did you do it that way?

A. Yes, sir; and then I took the davit and let it down, but before I took the davit and let it down, then Mr. Anelich start to holler. When he started to holler then I just turned around like this, and the axe was right here, and I

get the axe and I cut on this side and I cut four times here.

Q. Where was he at that time?

A. Well, he got his leg on the drum.

Q. Had you at that time finished pulling in these ropes? What do you call that rope?

[fol. 423] A. The purse line.

Q. Had you finished then pulling in the purse line?

A. Yes; sure.

Q. And the winch was in motion then?

A. Well, he was stopped.

Q. It was stopped afterwards; but was it before when he was pulling in the winch? Was the winch in motion just before he was hurt?

A. The winch was going when this was coming up.

Q. All right now. At the time you cut the rope with the axe, had the winch been stopped?

A. Yes, it was stopped, because it was marked right there one mark close to another.

Q. It was stopped at that time?

A. Yes.

Q. Did you see him when he was caught in the rope?

A. I don't know how he got caught, because I was like this, to take this rope out of this block; I was turned to the water, and he was over there (indicating positions).

Q. Now, who handles this purse line that comes through the block on his side? Who handled that rope?

A. He is supposed to but he was caught.

Q. Before he was caught who handled it?

A. He did.

Q. And what does he do with it as it comes off of the winch?

A. He's supposed to come and get this out of the drum and take this out and clear up the niggerhead, so this fellow right here he puts his on the winch and then he raises the seine up.

Q. You can take your chair now. (Witness resumes wit-

[fol. 424] ness stand.)

Q. Now, what did you do after he was hurt?

A. After he got hurt then I get a piece of rope and I tie it above his knee so he don't bleed.

Q. Over the boot, or under the boot?

A. Over his pants, not the boot.

Q. What happened to the boot?

A. The boot was on when I tied it.

Q. Was it taken off, or removed, afterwards?

A. Another guy took the boots off; I just tightened the rope.

Q. You put the rope around the leg?

A. Yes.

Q. Then what was done?

A. Well, then two guys was holding him on their arms and they put him in the skiff; from the skiff they put him on the "Congress."

Q. Who two men was that, do you remember now?

A. From the boat? Mr. Swalko and our cook.

Q. And they were taken to the "Congress"?

A. Well, they put him in the skiff and then the other boys took him to the "Congress."

Q. Did you see him that day after that?

A. I seen him when we came to Friday Harbor.

Q. You saw him at Friday Harbor?

A. Yes.

Q. Now, after he was put on the skiff, then what did you do on your boat?

A. Well, then, we all put the net on the platform.

Q. And then after you got it on what did you do?

[fol. 425] A. Then we went right away to Friday Harbor.

Q. Was there a board tied around the side of the winch, over here on this side?

A. No, sir.

Q. Was there a board here?

A. No, sir.

Q. Well, was there a board hanging on the winch?

A. Yes.

Q. Did you use it that day?

A. No, sir.

Q. Did you ever use it during the season when you were pulling in the purse line?

A. Sometimes when it was a big swell.

Q. Did you use it when you were pulling in on the purse line?

A. No.

Q. You say you did use it sometimes when there was a big swell?

A. Yes, on the Cape.

Q. That day, did the clutch slip?
A. No, sir.
Q. Was the work as you did it that day before he was hurt, the same way you had been doing it all summer?
A. All summer.
Q. Same way?
A. Same way.
Q. And he had done the same work all summer?
A. All summer.

Mr. Pierce: Take the witness.

[fol. 426] Cross-examination.

By Mr. Wallace:

Q. Mr. Brajcich, how long did it take the "Arizona" to get into Friday Harbor?
A. How long it took? Oh, I don't know.
Q. What time did you get in there?
A. We get there around ten o'clock, Standard Time, or about a quarter to ten.

Mr. Pierce: I wanted to ask him what time this accident occurred.
The Witness: It was about half past eight Standard Time.
Mr. Pierce: Had you pulled up any sets prior to that time that morning?
The Witness: No.
Mr. Pierce: That is the first set, was it?
The Witness: First set.
Mr. Pierce: Thank you, Mr. Wallace.

Mr. Wallace resuming:

Q. Mr. Brajcich, could you tell us what time you got into Friday Harbor?
A. When we got to Friday Harbor?
Q. Yes.
A. Well, it was around ten o'clock Standard Time.
Q. How long does it take you to make a set from the time you start to let out your net until you get back and pull it up on this fall?
A. Well, that depends.

Q. All right, go ahead and explain to the jury.

A. Sometimes it takes more, and sometimes it takes less. [fol. 427] If you've got to clear your net it don't take long, but if you've got it tangled up it takes you long; sometimes it takes you two hours and a half, and sometimes three and four.

Q. Were you tangled up on this set?

A. Well, it was some of it, but not much. There was corks all around the boat.

Q. When did you start to fish on the morning of the first of August, 1933?

A. Well, we was out and fishing around four or five o'clock.

Q. And when you have good operation of your net and don't get tangled up, how long does it take you to make a set and pull in?

A. Well, take that all in all, it would be about one hour.

Q. And how was your net tangled up on this set that Mr. Anelich was hurt on?

A. Well, the corks was all around the boat, you see, when we was working on it; these corks went all around the boat.

Q. Well, had it been tangled up before you pulled it back to the boat?

A. It was all right before he got hurt.

Q. Now, you say sometimes you use that stick and other times you don't use it?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

Q. Now, what is the occasion for you using it?

A. In case of rough weather, or a big swell.

Q. I am calling your attention to Plaintiff's Exhibit "A" [fol. 428] and I will ask you if that is the stick that was in there at the time?

A. No, sir.

Q. What?

A. No; not at that time.

Q. Well, was that stick on the vessel at that time?

A. It was hanging on the side of the winch. She was there all the time.

Q. Been there all season?

A. Yes, sir.

Q. And you only use it, you say, when the vessel is rolling?

A. When it's rough weather, yes.
Q. Why do you use it then, Mr. Brajcich?
A. Well, so as to protect it so it won't slip.
Q. What won't slip?
A. The clutch.
Q. And what makes the clutch slip out?
A. I don't know.
Q. What?
A. I don't know what makes it.
Q. Did it slip out any time on the "Arizona" when you were working on it?
A. I was working in the fall and in the summer and it never slipped.
Q. Now, who took this line,—I am having reference now to the line attached to the boom on Defendant's Exhibit One, for use in pulling up the rings and leads?
A. Mr. Mardesich.
Q. Was Mardesich helping you fish there at that time?
A. No; he just came there for his health.
[fol. 429] Q. Do you always have three men on the winch?
A. Mr. Mardesich, when he wasn't on board, I lift th rings up; but when he was there, why he does it.
Q. Now, Mr. Brajcich, what is this lever here that I am holding now on the starboard side of the winch on Defendant's Exhibit One, what is it used for?
A. To stop the winch.
Q. Is that the only use it has?
A. Down in the engine room there is a thing to stop the winch too.
Q. I mean this: Is that the only use this has is to stop the winch?
A. Yes.
Q. And can you start the winch with it, too?
A. The engineer has got to start it first inside in the engine room.
Q. Suppose your engine is going right along, then you can start and stop the winch with this lever, can you not?
A. No.
Q. What?
A. No.
Q. If the engine is running in the engine room below, can't you start and stop the winch with this lever?
A. Yes; after you start it down below first.

Q. Yes. Now, when you start to make your set, all the members of the crew are on deck, are they not?

A. Yes, sir.

Q. Including the engineer?

A. The engineer is in the engine room.

Q. Everybody is on deck. Does the engineer do any [fol. 430] work on board at all?

A. Well, he do sometimes. Until the purse line is on the boat, then he goes down to the engine room.

Q. Was the engineer, Mr. Lloyd Juddy, on deck at the time you made this set out at the time Anelich was hurt?

A. Well, he was in the engine room, and he was,—when we start the boat, see, he was on the stern pulling the corks, and then when we got the purse line in the water then the skipper told him to go down in the engine room and then he stay there.

Q. Now, when did he go down in the engine room, with reference to the time that you got the net in where you could get it on to the hook attached to the fall?

A. There was about two or three hundred feet of line yet in the water.

Q. What did he go down there to do, do you know?

A. To stop the winch when the Captain motioned to him to stop the winch.

Q. You could disconnect your winch right near where you stood, could you not?

A. Well, yes.

Q. Well, isn't that what you were doing? In other words, when these purse lines were being pulled in and you got them in as close as you wanted then, you could disconnect your winch, could you not?

A. No; in the engine room you stop it, when we get the rings close to the block.

Q. Well, you could have stopped it with this lever, could you not?

A. Oh, I dont know.

[fol. 431] Q. How's that?

A. Oh, I don't know.

Q. You don't know whether you could or not? Mr. Brajcich, isn't it a fact now that when your purse line is coming in like this, you take your turns around this two or three or four turns, depending on the number that you need for the necessary friction; and when you have got your net in

as close as you want it you just let the slack go and take the turn around here, and then throw your clutch out; isn't that the operation that you go through?

A. He stopped it down in the engine room.

Q. Well, how do you communicate with him in the engine room?

A. I don't know how. It is connected down below to stop it.

Q. But how does he know when you want to stop it?

A. The Captain told him to stop it.

Q. Where was the Captain?

A. He was on the deck.

Q. What part of the deck?

A. Oh, some place around the deck close to the platform.

Q. Does he have any particular place that he stands?

A. No, he don't have to have no particular place; maybe ten, twelve, fifteen feet.

Q. You don't mean to tell this jury that the Captain of the vessel could stand any place on the deck and communicate with the engineer down in the engine room, do you?

A. Well, he is right close to the davit most of the time.

Q. Where was he at this particular time when Anelich was hurt?

A. He was on deck.

[fol. 432] Q. Well, whereabouts on deck? What place?

A. The Captain was on deck.

Q. Well, where?

A. About five or ten feet from the davit.

Q. From what?

A. From those blocks, about five or six feet; I don't know for sure.

Q. Calling your attention to Plaintiff's Exhibit "C", just take this pencil, Mr. Brajcich, and mark where Mr. Pete Mardesich was standing at the time Anelich was hurt.

A. I don't know for sure exactly where he was, but he was down here some place,—right like this (indicating).

Q. Will you take and mark on there where he was?

A. I'm not sure.

Mr. Pierce: I object to that; the witness does not say he knows where he was.

A. I don't know for sure where he was. He was close between this hatch and here, so I don't know just exactly where he was.

Q. When you are pulling in, the hatch covers are on, are they not, Mr. Brajcich?

A. The hatch was covered.

Q. And state whether or not Mr. Anelich was standing on the hatch? Was he standing on the hatch?

A. When he got hurt?

Q. Yes.

A. Well, he was laying on the hatch when he got his leg on the drum.

Q. He was laying down?

A. Yes.

[fol. 433] Q. How did he get down?

A. I didn't see it.

Mr. Pierce: You are asking about Anelich now?

Mr. Wallace: Yes.

Q. He was down on the deck?

A. Yes.

Q. On the hatch cover?

A. Yes; and he got his leg on the drum.

Q. And where were you standing at that time?

A. I was right,——

Q. (Interposing.) All right, let's mark on Plaintiff's Exhibit "C" where you were standing. Take this pencil and mark on this exhibit "C" where you were standing.

Mr. Pierce: I object to that because the Exhibit "C" does not show the davit where the man said he was standing, and how can he mark on an exhibit that does not show the boat as it was? There is no need in trying to confuse the witness in something. That is not an exact duplicate and it does not show this davit. It is absolutely impossible, therefore, for the witness to mark on this exhibit where he was standing on this hatch.

Q. Will you mark it, Mr. Brajcich?

Mr. Pierce: I object to this as being asked to mark something that is impossible. I object to his being asked to mark it.

The Court: He may mark it as nearly as he can, even though the davit is not there, if he knows where the davit would show on that model.

Q. Come on, Mr. Brajcich, and let's mark it as near as [fol. 434] you can where you were standing at the time Mr. Anelich was injured.

A. Well, I told you I was right alongside of the blocks.

Q. I am insisting that you mark it on Plaintiff's Exhibit "C".

Mr. Pierce: And I am insisting, may it please the Court, the witness does not have to. He says he was alongside of the davit taking this out, and fixes his position definitely, his exact position definitely, and I am objecting for this reason: On a model of that kind, entirely out of proportion to the size of the boat, the positions as indicated would be entirely misleading and deceiving when we would get down to the final argument of this cause.

Mr. Wallace: It goes only to the weight of it as I see it.

The Court: I would not require him to mark it if he says he cannot.

Q. Were you on the port side of the vessel at that time?

A. I was right close to the davit.

Q. Which davit, the starboard davit?

A. Yes; on that side where I pull in my purse lines.

Q. You were pulling in from the port side, were you not?

A. Yes.

Q. You understand the port side of a vessel?

A. Yes, I was on the bow side.

Q. You were on the what?

A. I was on the bow side; on this side (indicating), I was.

Q. You were on the port bow?

A. Yes.

[fol. 435] Q. Aft of the house on the vessel,—to the stern of the ship?

A. To the stern from the house.

Q. That davit set in just opposite the winch, did it not?

A. Yes.

Q. Had you taken your line off at that time?

A. Yes, sir.

Q. Had the engineer gone below at that time?

A. He was down below before.

Q. And you had hooked up the strap on the rings?

A. Yes,—well, no.

Q. Who hooked those up?

A. Pete; he put that tackle on, Mr. Mardesich, Pete.

Q. Pete put this on, and then where did Pete go? When I say "Pete" I mean Peter Mardesich.

A. He went on the side.

Q. Which side did he go on, forward or aft?

A. To the stern,—this way (indicating).

Q. Back to the stern. And you walked around the winch to the stern of it, did you not?

A. Yes, when he started to holler I got the axe and cut the line.

Q. Now, what language did he use, that is, what tongue did he use?

A. Jugoslavian.

Q. The engineer, Mr. Juddy, did not speak your language, did he?

A. No; but I mean Mr. Anelich was talking Jugoslavian.

Q. Yes, I understand you; but Mr. Juddy did not speak your language, did he?

[fol. 436] A. No.

Q. And he didn't understand it either, did he?

A. No.

Q. Mr. Brajcich, do you remember the time that Mrs. Anelich and I and Mr. Hurd came to your residence in Cathlamet some time last fall?

A. Yes, sir.

Q. And talked to you about this case?

A. Yes, sir.

Q. And do you remember stating to me at that time in the presence of Mrs. Anelich and Mr. Jack Hurd, Mr. John B. Hurd, Jr., that you had never seen this lever that is now shown on Defendants' Exhibit Number One, or the lever that is shown in Plaintiff's Exhibit "A" in this case?

A. I didn't told you nothing about it.

Q. How's that?

A. I say I told you I don't know.

Q. You told us you didn't know?

A. I don't know about that handle.

Q. Did you not tell us at that time that you never had seen any lever there to throw out the clutch with?

A. I say I don't remember; I don't remember if it was there or not, I told you.

Q. And why did you tell us that?

A. Well,——

Mr. Pierce: Objected to as argumentative, may it please the Court; the presumption is he told him that because he did not know.

The Court: I think it is argumentative.

[fol. 437] Q. You did know, as a matter of fact, that there was a lever there, did you not, Mr. Brajcich?

A. I told you I didn't know; I don't remember.

Q. But you did know at that time that it was there did you not?

A. I don't know if I know or not at that time.

Q. Who gave you orders on the vessel to work, and the place where you should work?

A. Mr. Mardesich.

Q. Peter Mardesich?

A. Yes, sir.

Q. And who told Mr. Anelich to work on the after winch where he was working?

A. I don't know who tell him.

Q. What?

A. I don't know who tell him. I know who tell me.

Q. As a matter of fact, all orders come from the Master, do they not? Is that correct?

A. Well, I don't get you.

Q. I say, all the orders come from the Master, do they not? He is in charge of the ship, isn't he?

A. Sure!

Q. Was Mr. Antone Mardesich in charge of the vessel, or giving any orders?

A. No, sir.

Mr. Wallace: That is all.

Mr. Pierce: That is all.

(Witness excused.)

[fol. 438] MIKE SWALKO, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, please?

A. Mike Swalko, S-w-a-l-k-o.

Q. Your business, Mr. Swalko.
A. Fisherman.
Q. How long have you been a fisherman?
A. Since 1916.
Q. Working where?
A. I fish the Columbia River. The first time I fished in a purse seiner was in 1919, on a boat in the Columbia River.
Q. Did you afterwards work on boats in the Sound?
A. Yes, sir; since 1931.
Q. Did you know Mr. Anelich?
A. Yes, sir.
Q. When did you first work with him?
A. 1932.
Q. On what boat?
A. The boat named "[illegible]tague".
Q. And from where [illegible] working?
A. Everett, Washington.
Q. Do you know what work he was doing on the "Montague"?
A. He was on the winch.
Q. He was on the winch?
[fol. 439] A. The same as I was.
Q. Did he work all through that season on the winch?
A. Yes, sir.
Q. Was he an experienced fisherman?
A. Yes, sir.
Q. Do you know how long he had been fishing?
A. Well, I can't tell you how long he was fishing; he tell me that he has his own boat, that's all I know.
Q. But he had worked on the winch on the "Montague" in 1932 with you?
A. Yes.
Q. Now, you worked on the "Arizona" in '33, did you?
A. Yes, sir; and '34.
Q. And '34, too?
A. Yes, sir.
Q. What work was Mr. Anelich doing on the "Arizona" in 1933?
A. He was working on the winch.
Q. The after or forward drum, front or rear?
A. He was working on the rear, on the stern.

Q. Did he work on that job all summer until he was hurt?

A. Yes, sir.

Q. Tell us whether or not that is always done the same way, pulling in the purse lines and pulling in the fish?

A. Work every day the same thing; no matter how many sets you make you have got to do the same thing over and over again.

Q. What was your job on the boat?

A. My job was after the skiff-man throw me the line, then I give it to the other man here, the first one at the [fol. 440] bow, then he pull the line to the boat.

Q. At the time Mr. Anelich was hurt where were you on the boat?

A. I was on the turn-table.

Q. On the turn-table. Is that to the rear of the boat?

A. On the rear end.

Q. About how far away from the winch, were you?

A. How far I was from the winch? Well, I don't know how far it is from the drum to the turn-table. It must be around at least ten feet.

Q. What were you doing at that time?

A. I was waiting for the end of the net. You see, there is a piece of rope there I think about a twelve fathom rope, and that was my job to stretch that rope. After we pulled the leads up on the deck, then I stretch that end of the rope, you see, before we pick up the net.

Q. At the time he was hurt had the rings been pulled in?

A. What?

Q. Had the rings of the purse line been pulled in? Where were the rings at the time he was hurt?

A. It was on the block.

Q. And was there anything doing? What job were you doing in connection with the net when he got hurt?

A. I wasn't doing nothing.

Q. What was being done at the time?

A. Well, we was pulling up the rings; at the time when he got hurt you see everything stopped.

Q. With what?

A. With the block.

Q. Now, did you see him get caught?

[fol. 441] A. Did I see him? Well, I didn't exactly. If I knowed that he was going to get caught maybe I would watch, you know; but I only heard when he says in Slavonia language, "Oh, Mother of Mine".

Q. What did you see then? Did you turn around?

A. Then I jumped there and at the same time the Captain was standing there by the davit and motioned to the engine room to the chief to stop the engine, and George Brajcich stepped behind the mast and grabbed the axe and hit the rope two or three times and cut the purse line off, and it was all over in a few seconds. There wasn't any waste of time, you know.

Q. What was done with Mr. Anelich after he was hurt?

A. Well, after he got hurt we lay him on the hatch, and tore his apron off, and George Brajcich grabbed a piece of rope and tie his leg up above the knee. I was there and the cook, and George Brajcich, so we tied his leg up and took his boots off.

Q. Took both boots off?

A. No, I remember just one. I don't remember if we took both of them off or not,—just the one that got hurt.

Q. Did you take any more of his clothing off than that?

A. No.

Q. Then what was done?

A. Then we whistled for the boat; she was I guess right there, the "Congress", and she come over, see? And then I and the cook we went in the skiff. There was a net around our boat, you see, and we couldn't pick it up, you see; the corks was spread all around the boat, and we was tangled up so we couldn't get the boat close to our boat so [fol. 442] we went with a skiff, you know; so I and the cook went in the skiff and got ahold of the man, Mr. Anelich, and we stay in the skiff and hold the man in our arms, and when the other man row us to the boat "Congress" then we handed the man to the other mans on the boat and just lay him on the hatch. We never moved him. We asked him if it hurts him, you know; we want to keep him comfortable as we could, you see. He was all right, only he told us when we took his boots off, you know,—maybe the size was too big, you know, so he says "It hurts me" when we took the boots off, and then after that it was all right.

Mr. Pierce: Take the witness.

Cross-examination.

By Mr. Wallace:

Q. Did you look at his injury, Mr. Swalko?

A. No, I couldn't look at it because I didn't feel good when I seen the accident.

Q. Did they pull his pants up at that time?

A. No, sir.

Q. You didn't know how badly he was injured?

A. No, I didn't until I got to Friday Harbor.

Q. Did you see any blood?

A. No.

Q. Didn't see any blood at all?

A. No, I didn't see nothing, you know, because I didn't want to.

Q. Did you help take his boot off?

A. Yes.

[fol. 443] Q. Who actually pulled it off?

A. I and the cook.

Q. Both of you have hold of the boot?

A. No; I hold the man's leg above the knee and the cook just take it as easy as he could, you know, to pull his boot off.

Q. Did he have high boots on, hip boots?

A. Yes, sir.

Q. When you got that boot off didn't somebody turn it up and pour the blood out of it?

A. No.

Q. They didn't?

A. No, sir.

Q. What was your job on the "Arizona", Mr. Swalko?

A. I was boat puller. My job was,—I don't know. How could I tell you in American language? The skiff man throw the line to the boat and I get it.

Q. Then what did you do after that?

A. Then after that my duty was to get another small line and pick up the end of the net, pick up that end as close as I could so the fish don't get out.

Q. That is the cork line?

A. No, that ain't the cork line; that is the end of the net.

Q. There is a line that goes from the lead to the cork line, and you pull that up?

A. Yes; and gather that up together so the fish don't get out.

Q. That comes up through the small rings?
A. Yes.
Q. And you were pulling that up?
[fol. 444] A. That is my job.
Q. How fast does that net come in when you start pulling on it?
A. How fast does it come in?
Q. When you start pulling on the purse line?
A. The net don't come in. We just gather it together.
Q. I mean the purse lines.
A. Well, they come, I don't know how fast; it takes us maybe sometimes fifteen or twenty minutes to purse the net up.
Q. Fifteen or twenty minutes from the time you start pulling in until you get your purse line in?
A. Maybe ten minutes, I don't know; I never keep track of the time.
Q. Does it come in pretty fast?
A. No, it don't come fast. If you purse too fast you lose the fish.
Q. I see. Now, did you ever work on the winch?
A. Yes, sir.
Q. And how long have you worked on the winch?
A. I've worked three seasons, three years.
Q. Three years?
A. Yes, sir.
Q. Step over here, Mr. Swalko. (Witness stepping to model.) Now, we will not take so many turns because we cannot pull it if we do, but we will assume that you have four turns, or whatever is necessary there. Now, you pull in just about as fast as the line comes in. Just show the jury about how fast it comes in. (Witness illustrating)
Q. That is about the way it comes in?
[fol. 445] A. Yes.

Mr. Wallace: That is all.

Redirect examination.

By Mr. Pierce:

Q. Now, as you pull in, who handles that line?—anybody but the winchman?
A. Nobody but Mr. Anelich and Mr. Brajcich.
Q. The rope that you were pulling on, being the after rope, who handles that?—anybody but Mr. Anelich?

A. No, sir.

Q. He pulls it in?

A. Yes, that was his job.

Q. And where does he put it? Does he coil it, as you called it, there?

A. This man from the stern stays like this here,—stays right here.

Q. And where does he put the rope?

A. He coils it right here on this side by the back of him. He coils it here on the side.

Q. And that is the way you always do it?

A. That is the way you are supposed to do it.

Mr. Pierce: That is all.

Recross-examination.

By Mr. Wallace:

Q. What is the length of one of those lines, Swalko?

A. I never measured it, but the skippers of the boat, I heard them one time,—twenty fathoms. In purse lines somebody uses two pieces, and purse lines somebody uses [fol. 446] three pieces.

Q. How about the "Arizona"?

A. Maybe longer, you know; somebody may use it longer, and somebody shorter maybe.

Q. Seventeen or eighteen hundred feet, would you say?

A. Nineteen hundred, maybe; I don't know.

Q. Was the weather rough around there at the time of the accident?

A. No, it was nice and calm.

Mr. Wallace: That is all.

(Witness excused.)

Pete Matiaco, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, please?

A. Pete Matiaco, M-a-t-i-a-c-o.

Q. What is your business?

A. Oh, since 1930 I was fishing; before, I was sawyer in saw-mill.

Q. And were you a member of the crew on the "Arizona" during the season of 1933?

[fol. 447] A. Yes, sir.

Q. Were you on deck at the time this aceident occurred to Anelich?

A. Yes.

Q. Will you indicate where you were, about? Were you aft or forward?

A. Yes, I was on deck. When the net was in the water I was on deck all the time.

Q. Forward or aft on the boat? Were you in front or back of the boat?

A. I'm back.

Q. And what was your job back there?

A. I was pulling corks.

Q. And did you see this thing occur?

A. Yes.

Q. Tell us how it happened, as you saw it.

A. All right. (Stepping to model.) Joe Brajcich was working here, and Mr. Anelich was working here (indicating); and the turn-table is about sixteen feet, you see, from that drum. Mr. Anelich, you see, coils the rope here; that is his job to stay here. And when that middle rope, you see, came across to those rings,—oh, maybe about a hundred feet, you see, have got to come in yet, then his rope came from the drum, Mr. Anelich's, you see it come off from that drum; it come this way (indicating); and that rope was tangled up. You see, it was tangled up, you know, and then when the rope tangled up, you see he jump here,—about eight or nine inches from here to here (indicating), you see; then he put his left leg right here, and that rope it was tangled and it tangled him up. When [fol. 448] that rope was tangled up it knock him down. After it knock him down, you see, his leg was going over the drum.

Q. How long did that take?

A. Oh, maybe a second.

Q. When was the winch stopped?

A. When winch stop? Well, the winch, she was stopped, you see, when it cut his leg.

Q. How was he gotten out of there?

A. Brajcich take an axe and cut it the rope through.

Q. Then what was done with him?

A. All right. We take him and lay him right on the deck. Then we try to pull his boots off, see? He says, "Please don't pull my boots off because I've got a hurt". All right. "Mike", I says to him, "Hold him; I going to pull it easy all I can because the man he was suffer then." All right. Well, I pull him out, the boots, and after we pull him out, you see, we stay about ten minutes or five minutes maybe there, and then me and Mike take him to the skiff. The "Congress" skiff come right away near the "Arizona" because she can't come up to it, so then we take him to the "Congress", and then we come back on the boat.

Q. And after you got back what was done on the boat?

A. After we come down to the boat, you see, we untangled the net, you see; and then the whole crew from the boat help pull that net. After we pull the net, you see, we went to Friday Harbor right away.

Mr. Pierce: Take the witness.

(Witness resumes witness stand.)

[fol. 449] Cross-examination.

By Mr. Wallace:

Q. Your net was out here at this time, was it, a hundred feet did you say out here, and you were coming in with it?

A. No; still pulling, you know.

Q. Still pulling in on the purse line?

A. Yes.

Q. And the purse line is fastened to the net out here?

A. Those rings they was up here close to this here (indicating), when he cut his leg.

Q. But they had not come up to that yet?

A. No.

Q. And this hook wasn't hooked in yet?

A. I don't know about that.

Q. Had they put this strap on the rings at that time?

A. I can't remember, because I was about sixteen foot back, you see, and then I was just watching when the accident it was happening.

Q. Well, they couldn't put this on, Mike, until they got

the net in, could they, until they got the rings up? They would have to get the rings up first, wouldn't they?

A. The rings, I think, was coming pretty near here like this.

Q. And they were still pulling on this?

A. I don't know about that side if it was true or not, because I didn't see that side because this covers it; but I see this side.

Mr. Wallace: That is all.

(Witness excused.)

[fol. 450] GEORGE RUIJANCICH, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your name?

A. George M. Ruijancich.

Q. What is your business, George?

A. Oh, fishing, mostly.

Q. How long have you been a fisherman?

A. I've been fishing five years; and three of them up here.

Q. Were you a fisherman on the "Arizona" the year this accident happened?

A. Yes.

Q. Where were you at the time it happened?

A. In the skiff.

Q. Do you know how the accident happened?

A. No, sir.

Mr. Pierce: Take the witness.

Cross-examination.

By Mr. Wallace:

Q. George, they completed pulling in the purse lines when Mr. Anelich got hurt?

A. I don't know.

Mr. Wallace: That is all.

(Witness excused.)

[fol. 451] JACK S. MARINCOVICH, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, please?
A. Jack Marincovich, M-a-r-i-n-c-o-v-i-c-h.
Q. And what is your business?
A. Fishing.
Q. How long have you been a fisherman?
A. Oh, about seven years.
Q. Were you on the "Arizona" in August, 1933?
A. Yes.
Q. What was your job?
A. I was in the skiff.
Q. Were you on deck at the time the accident happened?
A. Yes, sir.
Q. You were on deck?
A. Yes.
Q. What did you see?
A. Well, I heard somebody holler and I seen the leg in the winch.
Q. Did you see the accident actually happen?
A. No; I seen it after it happened.
Q. How long after you heard somebody holler was it that the winch shut down, if it did shut down?
A. Well, it was just that quick; just when I had looked it had stopped.
[fol. 452] Q. Did you have anything to do with the winch, or making any of these tie-ups, that they need on deck?
A. No.

Mr. Pierce: That is all. Take the witness.

Cross-examination.

By Mr. Wallace:

Q. What part of the vessel did you say you were on, Jack?
A. During the accident?
Q. Yes.

A. On the stern of the boat.
Q. You did not see the accident?
A. When it happened, then I seen it.
Q. You don't know how it happened?
A. No.
Q. What did you do for Anelich, if anything, at that time?
A. Well, I don't know that I did anything.
Mr. Wallace: That is all.
(Witness excused.)

[fol. 453] Joe Dragovich, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Will you state your full name, please?
A. Joe Dragovich.
Q. And your business, please?
A. Fisherman.
Q. How long have you been fishing?
A. Since 1913.
Q. Do you own a boat?
A. I do.
Q. What is the name of the boat?
A. "Congess."
Q. Were you on the "Congress" the day Mr. Anelich was hurt?
A. Yes, sir.
Q. How did you first know of the accident?
A. One of my crew say that something happened on the boat "Arizona."
Q. And what did you do?
A. Well, I turned around and went over there to see what happened.
Q. How close did you get?
A. Oh, not very far, about thirty, forty feet; fifty maybe.
Q. What, if anything kept you from going closer?
A. There was corks all around the boat; I couldn't get to it.

[fol. 454] Q. There were corks?
A. Yes, sir.
Q. And was a man brought to your boat then?
A. Yes, sir.
Q. Did you know him?
A. I do.
Q. Had you known him before?
A. I did.
Q. He was a fisherman, was he?
A. Yes.
Q. Had he ever worked for you?
A. No, sir.
Q. But how long had you known him?
A. Since he came to Everett.
Q. After he got on your boat what did you do?
A. Well, a couple men hold him in their arms and I told one of the crew to get a mattress and blanket and put under the body of Mr. Anelich so he rest very easy on the hatch.
Q. And then what did you do? What was done then?
A. Well, Pete Mardesich told me to call up,—a buyer was just coming in from Kanaka Bay, and he told me to go over there and tell the buyer to take this man over to the nearest station for the doctor.
Q. Who told you that?
A. Pete Mardesich.
Q. By "Pete" you mean the Captain of the "Arizona"?
A. Yes, sir.
Q. And did you do that?
A. Yes, sir.
Q. How was he transferred from the "Congress" to the [fol. 455] "Excel II"?
A. Well, we had him on a mattress, and there. There wasn't a platform on the "Excel II"; they raised him up on the mattress and put this platform under the mattress so they can raise him easy and put him on the "Excel II."
Q. Did you see him after that, that day?
A. After that?
Q. Yes.
A. No.
Q. What did you do then after that? Did you do anything in connection with the "Arizona"?
A. That is all I done.

Q. That is all you did. Do you know whether or not Mr. Anelich was an experienced fisherman?

A. I do.

Q. Was he an experienced fisherman?

A. Yes, sir.

Q. Do you know whether or not he was an experienced winchman?

A. I don't know anything about that.

Q. You don't know anything about that?

A. No.

Mr. Pierce: Take the witness.

Mr. Wallace: No cross examination.

(Witness excused.)

[fol. 456] Mr. Pierce: I am getting very close to the end, may it please the Court. Might I ask whether or not Your Honor is going to close at four-thirty? Otherwise I will send for a witness. If it is going to be four-thirty it would be foolish to bring a witness over here.

The Court: It will be shortly after four-thirty, at least.

Mr. Antone Mardesich, resumed the stand for further examination on behalf of the defendants and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Mr. Mardesich, did you hire Mr. Anelich?

A. Yes, sir.

Q. Had you known him before the 1933 season?

A. Yes, sir.

Q. Do you know how long he had been a fisherman?

A. Yes.

Q. Tell us whether or not he was an experienced fisherman.

A. He was.

Q. In discussing his employment, was any particular job discussed between you and him?

A. No. Pete done that work. I got to hire him. He asked me for a job 'way before the time, and I couldn't

give him a job because I was full handed at that time, and I [fol. 457] told him if any man happened not to come I would give him a job; so one man didn't come with me, from the Columbia River, he was; he says he can't come, so after that I told him that he could have a job, so he says "Okeh"; so that's all that I had to do to hire him. Of course, I am the owner of the boat, and my son is the Master of it.

Q. There is a record of a telephone call from Friday Harbor to Blue 1332, whose number is Blue 1332?

A. Mine.

Q. Your home number here in Everett?

A. Yes.

Q. And who put that call in?

A. I did.

Q. And for what purpose?

A. For to notify Mrs. Anelich that,—I told her to talk to Mrs. Anelich and to go kind of easy because it would be kind of a shock to tell her that her husband had a broken leg.

Q. In other words, you called your wife and asked her to call Mrs. Anelich?

A. Yes, sir; tell her to tell Mrs. Anelich how the accident happened.

Q. Were any other calls made by you from Friday Harbor personally, that is, that you personally made?

A. I think I did, to Mr. Morris, but I can't recall because I was sick, you know, and I can't remember. I was a pretty sick man at that time.

Q. How long have you been ill now?

A. It's over two years now. It's since the fifth of Sep- [fol. 458] tember, two years ago.

Q. What is the nature of the ailment?

A. Heart.

Q. Does it permit your doing work as a fisherman, or hard work of any kind?

A. No, sir.

Q. Did you, accompanied by your wife after the accident occurred, call on Mrs. Anelich and her daughter?

A. Yes, sir.

Q. How soon after the accident was that?

A. That was,—well, let's see that day,—after we put Mr. Anelich on the Coast Guard cutter we left right then for home, so I couldn't tell you exactly; it took about seven or eight hours to run to Everett, and then I think it was the

next day. I don't know if it was the same day or the next day we went to see Mrs. Anelich.

Q. By "we" you mean yourself and wife?

A. Me and my wife.

Q. And who was there when you got there?

A. Well, it was Mrs. Anelich, I think, and her daughter.

Q. Did you at that time say to Mrs. Anelich that all of the crew were on deck?

A. No, sir.

Q. Were they all on deck?

A. No.

Q. Who was not on deck?

A. The engineer.

Q. Did you at that time say anything directly, or indirectly, to the effect that there was something wrong with your boat?

[fol. 459] A. No.

Q. Was there anything wrong with the boat that you know of now?

A. No, sir.

Q. Did you at that time say to Mrs. Anelich that at the time the accident occurred the engineer was on deck?

A. No, sir.

Q. Was he on deck?

A. No, sir.

Q. Did you at that time say to Mrs. Anelich that you had already pulled up four sets that morning?

A. No.

Q. Had four sets been pulled up that morning?

A. No, that was the first set we had made that morning.

Mr. Pierce: That is all.

Cross-examination.

By Mr. Wallace:

Q. Mr. Mardesich, what time did you start out that morning to fish?

A. I don't know what time they start out because, you know, I sleep. Sometimes they get up three o'clock, four o'clock, or half past four, it depends on how the tides are. I wasn't a working man there. I was resting.

Q. Have they no regular hours to start in the morning?

A. No, sir.

Q. You don't know what time they started on the morning of August first?

A. No, I don't.

Q. What time did you get up?

[fol. 460] A. Oh, it was about probably six o'clock in the morning.

Q. And they were fishing at that time?

A. No; they was looking for the fish; they wasn't fishing.

Q. Who looks for the fish?

A. Everybody on the boat.

Q. Do they go up on the pilot house?

A. The Captain is up there and I used to stay up there myself, and sit down there and look around, for my health.

Q. And you were looking for fish, too?

A. Why, sure. I had to look for something, because that is my occupation.

Mr. Wallace: That is all.

Redirect examination.

By Mr. Pierce:

Q. All the boys share in the fish?

A. Yes.

Q. The more fish they get the more money everybody makes?

A. That's it exactly.

Q. So they are all looking for fish?

A. That's it exactly. Of course, I wasn't getting any shares out of it.

Mr. Pierce: That is all.

Mr. Wallace: That is all.

(Witness excused.)

[fol. 461] RAY DALTON, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, please?

A. Ray Dalton.

Q. Your business, Mr. Dalton?

A. District Manager of the West Coast Telephone Company.

Q. And as such have charge of the local exchange in Everett?

A. I do.

Q. And that also includes the long distance calls?

A. It does.

Q. Are those records made under your immediate supervision?

A. Yes, they are made under my supervision,—not immediate though.

Q. Have you brought up your records showing certain calls from Friday Harbor to certain parties on the morning of August 1st, and also calls from Everett to Port Townsend on this morning?

A. I have.

Q. Will you tell us what your records show as to those calls?

A. We have four calls on that particular day. We had two calls from Main 1027, the Fishermen's Packing Corporation; the first one at 11:00 A. M., Daylight Saving Time, to the Coast Guard at Port Townsend.

Q. Does the ticket show whether or not the call was com-
[fol. 462] plete or not?

A. The call was completed, and was talked upon. This call, as I say, was filed at 11:00 A. M., Daylight Saving Time.

Q. And what other calls have you?

A. The second call was at 2:55 P. M., also Daylight Saving Time, to the Coast Guard at Port Townsend.

Q. Was that call completed?

A. That call was completed.

Q. How much time was consumed in that conversation, or does your slip show the time?

A. A minute and three-quarters.

Q. Do you show any incoming call to the Packing Company from any source on that morning?

A. We have one call from Friday Harbor which was filed at Friday Harbor at 10:40 A. M. Now, I don't know whether Friday Harbor was on Daylight Saving Time or not at that particular time.

Q. That call was from whom to whom?

A. From Mr. Makovich to Mr. Morris at Main 1027, Fishermen's Packing Corporation.

Q. That was 10:40, Friday Harbor Time?

A. Yes, sir, that is right. Then we have one more call from Friday Harbor, Mr. Mardesich to Mrs. Mardesich, at Blue 1332, received at Everett at 12:42 P. M., and the filing time of that call was 12:33.

Mr. Pierce: Cross examine.

Cross-examination.

By Mr. Wallace:

Q. Who put in the first call to Port Townsend?

[fol. 463] A. Mr. Suglian.

Q. And who put in the second one?

A. The same man.

Q. Have you any call there to Port Townsend put in by Mr. Morris?

A. We have no record of any from that number.

Q. Did you look for any other calls from Friday Harbor other than the one from Mardesich to Morris, and Mardesich to Mardesich.

A. These are the only calls that we were asked to produce by the Court. If I may qualify that, these calls from Friday Harbor are collect calls; that is the reason we have a record of them. There may have been other calls placed at Friday Harbor and paid for at Friday Harbor, and we would have no record of those calls.

Mr. Wallace: That is all.

Mr. Pierce: That is all.

(Witness excused.)

Mr. Pierce: I have only two more witnesses, I think. I believe it would save time if I can look over my list and wait until tomorrow.

The Court: Well, we are going to adjourn anyway until tomorrow morning at half past nine. The jury room is now available to you jurors.

(Adjournment taken at 4:25 o'clock P. M., November 15th, 1934 until 9:30 o'clock A. M. November 16th, 1934.)

[fol. 464] November 16th, 1934, 9:30 o'clock A. M.

The Court convened pursuant to adjournment; all parties present as heretofore; jury in the jury box.

MRS. ELLEN MARDESICH, called as a witness on behalf of the defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Will you state your full name, please, Mrs. Mardesich.
A. Mrs. Tony Mardesich.

The Court: Your own name, please.
The Witness: Ellen Mardesich.

Q. You are the wife of Tony Mardesich?
A. Yes.
Q. And the mother of Captain Pete and Captain John?
A. Yes.
Q. You have recently been burned?
A. Oh, I'll say I have.
Q. Now, do you remember the time that you and your husband went and called on Mrs. Anelich after Mr. Anelich had been hurt?
A. Yes, sir.
Q. Where did you go to see her, at her house, or did she come to your house?
[fol. 465] A. We went to her house.
Q. And I will ask you whether or not at that time Mr. Mardesich said to her that there was something wrong in the boat, and the rope''?
A. No, we never talked about anything about that.
Q. Did Mr. Mardesich say at that time to Mrs. Anelich and her daughter, "You know, my husband he kind of figure him jump, you know, and he fall down with his legs up and his hands down, you know, on the floor, and the rope caught him in the legs''?
A. No.
Q. At that time did Mr. Mardesich say to Mrs. Anelich or to her daughter that at the time the winch was always running?

A. We never were talking about the winch or about the fishing.

Q. You did not talk about the winch or about the fishing at all?

A. No.

Mr. Pierce: That is all.

Cross-examination.

By Mr. Wallace:

Q. Did Mrs. Anelich ask your husband how her husband had been injured?

A No, she just say like this: we went there to tell her we was sorry it happened and Mrs. Anelich said "It's too bad, but Mr. Anelich is an experienced man; he has been working on the winch," and she says that "Accidents happen." That's all we was talking about the boat, about the fishing.

[fol. 466] Q. Didn't she ask Mr. Mardesich how it happened?

A. Mr. Mardesich was pretty sick, and he didn't really know how it happened.

Q. Your husband said that?

A. That he see he got hurt but he don't know how it happened.

Q. That is the statement made by your husband, that he did not know how it happened?

A. He say he don't know how it happened.

Q. Didn't he say to her at that time that Mr. Anelich had gotten his leg in the purse line when they were pulling in on the purse line?

A. No, we didn't talk any more about that.

Q. You didn't talk any more about that?

A. No.

Mr. Wallace: That is all, Mrs. Mardesich.

Mr. Pierce: That is all.

(Witness excused.)

MR. ANTONE MARDESICH, recalled for further examination on behalf of defendant, testified further as follows:

Direct examination.

By Mr. Pierce:

Q. Mr. Mardesich, you told us how long you had been operating fishing boats?

A. I've been running them over twenty-five years.

[fol. 467] Q. I will ask you whether or not at any time during the season a fisherman who is on the crew may quit?

A. Yes, sir, he can quit any time he wants to. I've seen a man pulling up the net and he got mad and dropped the net and went down to the bunk and he said "I don't want to work no more," and I couldn't do nothing with him.

Q. The times when you are fishing off of the Cape do you stay out at the Cape, or do you go to harbor at night?

A. We go to harbor every night; I never stop out there.

Q. What harbor do you generally go to?

A. To Neah Bay.

Q. On the nights when you anchor where do you generally stop the boat, on the high sea or in the harbor?

A. Sometimes we tie up to the dock, and sometimes there is five or six boats together there.

Q. When you are in the Sound do you tie up at night, or anchor, or what do you do?

A. We tie up to the piles, and sometimes anchor, if there is a dolphin driven some place in the bay.

Q. Do the fishermen have any time off during the week?

A. Yes; on Friday afternoon four o'clock until Sunday morning four o'clock.

Q. And at that time when they have that time off do you go into port, or do you stay out on the high seas?

A. No; we go to the port to oil up and get the grub for the next week's fishing—go to Friday Harbor, or wherever there is a place for us to go, and make the supplies for the next week's fishing.

Q. When you are fishing in the sound, how often does the buyer come to your ship?

[fol. 468] A. Every day.

Q. And when you are fishing off the Cape where do you contact, or where do you see the buyer's boat?

A. We have got a station in Neah Bay, a big scow, and we unload the fish on the scow, and sometimes there is two or three buyers handy there, you know.

Q. You see the buyer when you are fishing at the Cape then, every day?

A. Yes, sir.

Q. Mr. Mardesich, did you ever see this page in the Seattle telephone directory? Did you ever see that page?

A. No, sir, I didn't.

Q. Did you ever ride in an airplane?

A. No, sir, I didn't.

Q. Did you ever hear of a fisherman being taken from a vessel in an airplane?

A. No, sir, I didn't. I never knew that an airplane could come to it.

Mr. Pierce: You may cross examine.

Cross-examination.

By Mr. Wallace:

Q. All these members of the crew sign up before the season starts, do they not?

A. No; they don't sign anything.

Q. They don't sign anything?

A. No.

Q. Isn't it a matter of fact, Mr. Mardesich, you have to go before the Commissioner, the Fish Commissioner?

A. No.

[fol. 469] Q. You go to the Fish Commissioner, don't you?

A. No, we don't go to him. No, the Fish Commissioner send us affidavits because it's illegal for the un-citizen to fish or to testify; that's the only thing they send us to sign, so they will know if they are un-citizens.

Q. And you send in the names of all your men?

A. Yes, we send that affidavit; and every man has to sign that he is a citizen, because if he isn't a citizen he can't fish. He is unlegal fisherman. The cook can be an un-citizen man, but the rest of them have got to be all citizens.

Q. When the seamen, or fishermen, desert your boat you don't pay him, do you?

A. Oh, yes, you have to pay him what he earns.

Q. That is your view of it?

A. Up to that time if he's got anything coming up to the time he quits.

Q. You know as a matter of fact that you can forfeit all that he has earned up to that time as a matter of law?

Mr. Pierce: I object to that as a statement of law.

Mr. Wallace: He has been a fisherman for 25 years, and he ought to know what the rules are for fishermen.

The Court: Sustain the objection.

Mr. Wallace: Except.

Q. Now, when you went into Friday Harbor, did you ask the telephone operator there to let you see the Seattle telephone directory?

A. No.

[fol. 470] Q. Did you ask her if she had one?

A. No.

Q. You did not call anybody over the 'phone except your wife, Mrs. Mardesich, did you?

A. I don't think I did. I call up because I was so sick that I could hardly get to the telephone office up there and I had a man to bring me down to the boat in a car because I wasn't able to come back.

Q. Now, when you talked to Mrs. Mardesich over the 'phone on the morning of August 1st, 1933, did you tell her that Anelich had been injured?

A. I told her to tell Mrs. Anelich that her husband got hurt and that we was going to take him down to Seattle to the Marine Hospital and that she can go down to see him.

Q. Did you tell her to get hold of the Coast Guard, to 'phone the Coast Guard? Did you tell Mrs. Mardesich to 'phone the Coast Guard for somebody to come?

A. No, I didn't talk to her about that because I know they sent it already, the telegraph, from Mitchell Bay for the Coast Guard, that is what the Captain told me, Tony he says, "The Coast Guard going to be here about twelve o'clock."

Q. About what time?

A. He told me that the Coast Guard going to be there about twelve o'clock, or probably a little after, but I can't state to you just exact the time; but he says, "Lee Makovich got off at Mitchell Bay and he put the call in for the Coast Guard," so we didn't call any more because we thought that was all right.

[fol. 471] Q. You are familiar with the location of Port Townsend, aren't you, Mr. Mardesich?

A. Not very much.

Q. You know where it is?

A. Yes, I do; I've been there, but I'm not well acquainted with it.

Q. How far is it from there to Friday Harbor?

A. Well, I can't state the miles.

Q. Well, approximately.

A. Oh, I should think about twenty-five miles, thirty miles, something like that,—maybe about twenty, twenty-five miles. If course, I don't know only just approximately.

Mr. Wallace: That is all.

(Witness excused.)

PETE MARDESICH, recalled on behalf of the defendants, having been sworn was further examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Captain, calling your attention to Defendant's Exhibit Number Four for identification, will you come down and tell us what it is? Just step down here and tell us what this is, the whole thing.

A. This is a chart of part of Puget Sound.

[fol. 472] Q. Is that a chart similar to the one you have on the boat?

A. Yes, we have three or four charts of the different parts of the Sound.

Q. Does this indicate Friday Harbor? If you find it there will you indicate it, please, with the pointer?

(Indicating as requested.)

Q. Now, at the place you have indicated will you mark with an "X"? Now, will you indicate on the map where you were fishing, or where your boat was, at the time this accident happened, and mark that "X-1", please.

(Marking as requested.)

Q. Now, will you go back to the Friday Harbor mark and put a "3" after the "X" that you have placed there?

(Marking as requested.)

Q. Will you outline to us now the course that the boat had to take in getting from Mitchell Bay, or "X-1" or "X-2" to Friday Harbor? What course would you take?

A. Well, there is two or three different courses.

Q. Well, what course was taken this morning? Did you go this way, or this way?

Mr. Wallace: Which boat, Mr. Pierce?

The Witness: I went on the "Arizona".

Q. State whether or not that is the usual course for going around there, followed by seamen?

A. Yes.

Q. Just indicate with the pointer generally so everybody can see.

A. You mean how I travelled around here, you mean?

Q. Yes.

(Indicating course as requested.)

[fol. 473] Q. There are so many passage ways that you take advantage of?

A. Yes, sir.

Q. Now, will you indicate on the map with an "X-4" Victoria?

(Indicating as requested.)

Q. Does Port Townsend show on this map?

A. No, I don't believe it does; no, Port Townsend is 'way off in this direction.

Q. Do you know the distance from Smallpox Bay to Port Townsend?

A. How far is it from Smallpox Bay to Port Townsend?

Q. Yes.

A. Oh, it would take us, I should say, about six or seven hours.

Q. And what, if anything, is the difference in the nature of the sea you have to travel in going from Friday Harbor to Smallpox Bay and going from Smallpox Bay to Victoria?

A. This here is a foreign country, you see, and we aren't allowed to stop.

Q. But do you go across the Straits?

A. There is a straits in here; this isn't so smooth, you know, right here.

Q. It might be rougher than other ways?

A. Yes, this is all open water here; and inside here it's smooth.

Q. Have you got a scale, or what do you call them?

A. Divider.

Q. Will you tell us the distance first that you would travel from Smallpox Bay to Friday Harbor by boat, and tell us what that distance is?

[fol. 474] A. It's fourteen miles.

Q. Now, in marking that off,——

A. (Interposing.) That is nautical miles; it's a little better than the regular mile.

Q. Have you followed the course about that the boat would have to take, that is, the distance from shore, and channels, and all that, have you taken that into consideration?

A. Yes, sir, oh, yes.

Q. Now, will you tell us what the distance is from Smallpox Bay to Victoria?

A. I've never travelled along Victoria very much, you know.

Q. Well, give us the water route then if you can that the boat would have to take, if you know.

A. I never travelled around this part. The course I would take from where we'd have to go from there out to the Cape?

Q. You don't know the route you would take in here?

A. No.

Mr. Pierce: Do you know, Mr. Mardesich?

Mr. Antone Mardesich: No, I don't.

A. It would take time to study that out.

Q. Does it show on here the passages that are open to seamen and the passages that they take? If it does, give us the scale. Figure out the way you would go if you had to run in these as captain.

A. Well, I wouldn't take a chance.

Q. You just figure out the way you'd go if you had to make it and were working on this chart aboardship. That is what you would be governed by if you were going into a

[fol. 475] port you were not familiar with, isn't it; you would go by the chart?

A. Yes.

Q. Then, you figure out the way you would go if you were going to figure it out by chart.

A. Seventeen miles.

Mr. Pierce: You may resume the witness stand. Take the witness, Mr. Wallace.

Cross-examination.

By Mr. Wallace:

Q. Captain Mardesich, will you come down here a minute please?

Mr. Pierce: One other question. You spoke about it being a foreign port, do you know whether that makes any difference or not?

The Witness: I could not say if it does or not, but I believe it does. I'm not absolutely sure on that.

Q. Put your divider on here again, and coming through this passage here and right through this passage here, and around to Victoria, would you just show us that? Go ahead.

A. Well, now, the reefs are here and you'd have to circle around that.

Q. You know you go through those two lights, don't you Captain?

A. Just a minute, I lost track of the number.

Q. You come on the outside over here.

A. It would be about fifteen and a half miles.

[fol. 476] Q. And you would not go a mile out there, would you, from the land as you showed with your divider?

A. What?

Q. I say, it would not be necessary for you to go a mile out would it?

A. Yes, sir, if I was going to do it I'd go outside of here because I'm not familiar at all with this here part of the country. I have been working around in here for five or six years, and I know this country thoroughly. I can go in lots of places where it is close and save a lot of time.

Q. You are familiar with the charted waters, aren't you?

A. How do you mean?

Q. Well, the Government has chartered the Puget Sound Country and have put up lights and signals?

A. Yes.

Q. And you understand those?

A. I understand some of it, yes. I am going to a navigation school now to learn more about it.

Q. You know there are two lights there where you come down through that passage?

A. Yes.

Q. And that indicates that you can go between them, doesn't it?

A. Why, yes.

Q. And then, there is one on the point there, and that indicates that you should stay outside of it, doesn't it?

A. Yes; but you see these marks in here indicates reefs, all these marks in here.

Q. Captain, as you come down through here you go be- [fol. 477] tween those lights, and then you pick up this light, don't you, if it's dark?

A. Yes.

Q. And then you keep outside of that, don't you?

A. Yes, sir.

Q. And then you come around here. You wouldn't stay a mile out here, would you?

A. Yes, I'd come right straight across here.

Q. That's right, just come right straight across there. Now, the weather was clear this day; the sun was shining, wasn't it?

A. It's hard to recall, but it was a nice day.

Mr. Wallace: That is all.

Redirect examination.

By Mr. Pierce:

Q. By the way, the course that you took would be governed somewhat by the condition of the tides and the winds, too, wouldn't it, Captain?

A. How was that?

Q. The course that you took, or would take, in going to Victoria, would that be changed any by the condition of the tides?

A. Yes, there is a strait right in there that all the water

of Puget Sound goes through, and heavy tide rips in there, and swings your boat.

Mr. Pierce: That is all.

(Witness excused.)

[fol. 478] LEITHA EDDY, called as a witness on behalf of defendants, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pierce:

Q. Your full name, please.
A. Leitha Eddy.
Q. You are a resident of what city?
A. Here in the city.
Q. Where are you employed?
A. Fishermen's Packing Corporation, and Padilla Point Oyster Company.
Q. What are your duties?
A. I am a timekeeper.
Q. Have you made a search of the records of the Padilla Oyster Company for the purpose of showing the earnings of Mr. Mario Anelich during the year 1933?
A. I have.
Q. What was it?
A. In 1933 he earned from Padilla a total of $23.06.
Q. And did he also work for the Packing Company?
A. He worked for the fishermen in 1933, and earned a total of $28.07.
Q. Have you also his earnings there for the fall of 1932?
A. In 1932, the winter, he worked for the fishermen and earned a total of $43.75.
Q. What about Padilla Oyster?
A. He didn't work for Padilla in 1932.
[fol. 479] Q. His total, then, for both companies for the winter season of '32 and '33 amounted to how much?
A. $94.88.
Q. That is for two years?
A. Yes.

Mr. Pierce: Take the witness.

Cross-examination.

By Mr. Wallace:

Q. How many days did he work for the Oyster Company?
A. I don't know that; I have just the total payroll figures.
Q. How much did you pay him per day?
A. I don't know that. He was paid by the hour, probably at that time about forty-five cents an hour.
Q. And how much did you pay per hour for the Fishermen's Company?
A. In 1933 it was the same, forty-five, forty or forty-five cents, I'm not certain.
Q. And in 1932 what did he get per hour, or day?
A. Well, it wouldn't be less than forty.

Mr. Wallace: That is all.

(Witness excused.)

Mr. Pierce: I want to offer in evidence at this time Defendants' Exhibit Number One, being the winch, Number Three, the first aid kit, and Number Four, the map which is now on the easel. We are offering these exhibits in evidence at this time.
[fol. 480] Mr. Wallace: No objection.

(Whereupon Defendants' Exhibits "1", "3" and "4" referred to were received in evidence.)

Mr. Pierce: Defendants rest.
Mr. Wallace: Call Mr. Bolstad in rebuttal.

Sverre Bolstad, called as a witness on behalf of the plaintiff in rebuttal, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wallace:

Q. State your name, Mr. Bolstad.
A. Sverre Bolstad.
Q. Where do you reside?
A. In Seattle, Washington.

Q. What is your business or occupation, Mr. Bolstad?

A. Machinist and engineer.

Q. Where have you been employed?

A. I have served my time as apprentice in McKenzie and Petrich, and I have been engineer on several fishing boats of the Nakat Packing Corporation.

Q. How long have you worked as an engineer of fishing vessels?

A. Approximately three years.

Q. Actually engaged in purse seine fishing?

[fol. 481] A. Yes, sir.

Q. Did you on yesterday make an examination of the "Arizona"?

A. Yes, sir, I did.

Q. And who accompanied you at that time for the purpose of making that examination? Who went with you?

A. Mr. Erickson, I believe, it was, and Mr. Zundel.

Q. Will you tell the court and jury what you found on the "Arizona" that does not correspond with Defendant's Exhibit One, which is the winch here in question? Just tell us how this model differs from what you found on the "Arizona".

(Witness stepping to exhibit.)

A. Well, the first thing, this throw-out lever on the clutch on the "Arizona" has a bend in it.

Q. Did you make a sketch of that?

A. I took a templet off of the lever and here is the angle of the lever, and it's made at such an angle that when it's put in place there is a little block and kind of a wedge to hold it in which you can't take it out then. This here lever doesn't show, and on the clutch down here is,——

Q. (Interposing.) Just one minute, Mr. Bolstad. Calling your attention to Plaintiff's Exhibit "A" I will ask you if that correctly shows the block that you are speaking of?

A. Yes, that is the block there.

Q. Calling your attention to Plaintiff's Exhibit "L", I will ask if that is the templet that you made actually from that lever on the winch which is now shown on the "Arizona"?

A. Yes, sir, I made this myself yesterday.

[fol. 482] Q. Now, in your operation as a fisherman have you ever seen a block used as you found on the "Arizona" yesterday?

A. Well, very seldom. I have seen a little wire on it just temporary to hold it until they could get into port and get the jaw clutch fixed. A thing like this is nothing but just a trap, that's all.

Mr. Pierce: I object to the comment of the witness and move that it be stricken.

The Court: Yes, the remark of the witness to the effect that such a trap is stricken, and the jury instructed to disregard it.

Q. State whether or not, Mr. Bolstad, that the use of that piece of timber, or wood, or block, or whatever you call it, as shown on Plaintiff's Exhibit "A" would make that dangerous to life and limb, or otherwise?

Mr. Pierce: Objected to as calling for a conclusion of the witness. This man is not qualified, and it is calling for a conclusion on a matter that the jury can pass on just as well as this witness can.

The Court: The objection is sustained. It will be a question for the jury and not for the witness.

Mr. Wallace: Except.

Q. Now, Mr. Bolstad, describe to the jury how and in what respect, if any, the clutch which is now shown here on Defendant's Exhibit One differs from the clutch that you actually found on the "Arizona", if you examined it?

A. Well, for one thing, this drive clutch here, the jaws are chipped off. It tapers so when she is driving it has a tendency to spring apart. The drive side of this jaw is chipped off. On one side it is a quarter of an inch and [fol. 483] tapers down to three-quarters instead of a full inch and a half, and on the other side it is three-quarters instead of a full inch and a half.

Q. Could you mark that, Mr. Bolstad, with something, indicating approximately as near as you can how much it was worn off?

Mr. Pierce: Now, of course, this is objected to as redirect, may it please the Court.

Mr. Wallace: No, Your Honor, it is not intended as that. We are intending and attempting to show the difference between this exhibit and what he actually found on the "Arizona".

Mr. Pierce: There has been no dispute about that. We put in evidence that showed those things, and you showed your version of the clutch and we have showed ours. Nobody claims this clutch is in the same condition as one that has been used two years.

Mr. Wallace: You bring this here, I assume, Mr. Pierce, as a sample of what you had on the ship.

Mr. Pierce: We have never made any contention that this clutch is in the exact condition as the clutch on the boat. We put this in evidence and then we brought the man in here to show just wherein it was different. We naturally could not duplicate it.

The Court: Well, even with that conceded I think it is proper to have this witness assume to mark within his knowledge, and to disclose any differences there may actually be, between the model, the exhibit, and the actual clutch.

(Witness marking as directed.)

[fol. 484] Q. Mr. Bolstad, will you take the stand again?

Mr. Wallace: We offer in evidence Plaintiff's Exhibit "L".

Mr. Pierce: I have no objection.

(Whereupon cardboard lever referred to was received in evidence and marked Plaintiff's Exhibit "L".)

Q. How long have you been engaged in the mechanical business in repairing fishing vessels?

A. About five years, I should say.

Q. And can you give us approximately the number of vessels that you have worked on and repaired?

A. Oh, I've been on hundreds of purse seine boats repairing them.

Q. Did you at any time repair clutches?

A. Yes, a good number of times.

Q. Now, state to the jury how, if it could be done, the clutch on the "Arizona" could have been removed, and how long it would take to remove it, to take it out of place?

Mr. Pierce: Objected to as imcompetent, irrelevant and immaterial.

Mr. Wallace: Now, if the Court please, it is an important situation. This vessel is within a mile of this court house. That clutch is there. I want to prove by this witness that not to exceed two hours is the time it could have been taken out and brought in here so the jury could see it. It is within the possession of the defendant; we can't take it out.

The Court: Sustain the objection. That is not an issue in the case.

Q. In the operation of a purse seine vessel, tell the jury [fol. 485] whether or not it is customary and usual for the engineer to go below, and if so, when?

A. Well, I've been on several seine boats and I see no reason for the engineer going below at all.

Mr. Pierce: Move that the answer be stricken as not in response to any question. Custom,—what this man thinks does not make any custom.

The Court: The motion is granted. The answer is not responsive.

Q. Do you know the custom generally of fishing crews, and the methods that they work?

A. Yes, sir, I do.

Q. How long have you been familiar with that?

A. For about three years.

Q. Just tell the jury now what the engineers duties are, customarily, where he works, first. Go through the operation of pulling in, casting out, and pulling in, just tell us where he is.

A. Well, the engineer is answering bells below, and when they make a set they go around and pick up the skiff. When the skiff is made fast the engineer comes up on deck and as a rule the engineer and the cook pull corks on the stern, until they purse up the seine, and then the engineer generally piles the lead line, and when that is through he goes below into the engine room again.

Q. And then what do they do then?

A. Then they get ready for another set.

Q. Are you familiar with the kind of an engine that is on the "Arizona"?

A. Yes, I am.

[fol. 486] Q. State whether or not it will operate without having one in attendance as an engineer?

A. No; they have to have an engineer to operate it.

Q. Yes. But while you are performing your casting out and pulling in, is it necessary to have an engineer there?

A. No; no, there is no necessity for it.

Q. Is it customary that they do have an engineer to attend while they are pursing in?

A. I don't think so. I've never seen it myself.

Q. And you have acted as an engineer on purse seine vessels?

A. Yes, sir.

Q. Does this engine have a governor on it?

A. Yes, it has a governor.

Q. And what is the purpose of the governor?

A. Well, it's to regulate the speed; at a certain set speed, why it holds it at that speed.

Q. State as nearly as you can,——

Mr. Pierce (interposing): May it please the Court, at this time I am going to object to further examination along this line.

Mr. Wallace: I am not going to examine further along that line.

Mr. Pierce: I move that the testimony be stricken upon the ground that it is not in harmony with the allegations of this complaint; the allegations of this complaint having charged us with negligence because the engineer was not in the engine room at the time this accident occurred. Now, having charged us with negligence in that particular they now come in and show that he should not have been there anyhow. It is entirely inconsistent with the allegations of [fol. 487] this complaint. That is one of the specific charges of negligence, that the engineer was not below. Now, they say they don't need an engineer at all. It is inconsistent and it does not tend to prove any issue in this case, and I move it be stricken and the jury instructed to disregard it.

Mr. Wallace: If the Court please, we resist that motion. It is not an allegation of negligence. We simply set forth the facts exactly as we thought they existed at the time.

The Court: The motion is denied.

Q. Mr. Bolstad, it has been testified here by witnesses during the trial of this case that the maximum speed of the drum on the winch, or niggerhead, actually measured (as developed by the mechanism that attaches it to the engine as you saw it, and as they have testified), one hundred and

fifty revolutions per minute; that the minimum speed at which it could travel was ninety revolutions per minute with a possible ten revolutions less under a load, making a minimum of eighty revolutions per minute. Have you calculated the number of feet per minute that the purse line would be coming in with those revolutions?

A. Well, the number of times that gypsy turns up it should come in about two hundred and forty feet a minute, but that is quite fast. It's hardly possible that it should come in that fast.

Mr. Wallace: That is all.

[fol. 488] Cross-examination.

By Mr. Pierce:

Q. You never saw the "Arizona" engines in operation?

A. No, I haven't.

Q. And you have been fishing how long?

A. I've been fishing three seasons.

Q. What boats?

A. The "Theresa S". I fished salmon fishing on her, and herring fishing, and I fished on the "Umatilla".

Q. Did you ever fish on a boat operating out of Puget Sound?

A. Yes, 1932.

Q. On what boat?

A. The "Theresa S".

Q. You say that none of the fishing boats carry engineers?

A. They all carry engineers.

Q. And the purpose of having an engineer is to take care of the engine, isn't it?

A. Absolutely.

Q. And stop it when you want it stopped?

A. Yes.

Q. And start it when you want it started?

A. That's right.

Mr. Pierce: That is all.

Redirect examination.

By Mr. Wallace:

Q. What is the purpose of the lever that is indicated on Plaintiff's Exhibit "A" in the picture, and Defendants' Exhibit One, the model here?

A. Well, they use that when they are pulling their purse [fol. 489] lines in, and when they get the rings up they slip the line a little bit and make it fast on the bit, and they stop the winch from revolving by that throw-out lever.

Q. The purpose of it then is to throw the clutch in and out?

A. Yes, sir.

Q. Have you ever seen in any of your work as a fisherman, a similar stick to the one that is shown in Plaintiff's Exhibit "A"?

A. I've never seen a stick like that, no.

Q. From your experience in the operation of purse seine vessels as an engineer, what would you say as to whether or not the clutch on the "Arizona" as you saw it yesterday when a load is applied upon it,—say three tons,—would or would not slip out?

Mr. Pierce: I object to that assumption of three tons. My recollection is that it is a thousand or fifteen hundred pounds. I think counsel is in error in that assumption of three tons.

Mr. Wallace: I think that is what Mr. Mardesich said.

Mr. Pierce: My recollection is that he said a thousand or fifteen hundred pounds. There is no need of talking about three tons.

Mr. Wallace: Wait a minute! I will supplement and add to my question.

Q. Assuming, Mr. Bolstad, that there is a purse seine out seventeen hundred to nineteen hundred feet in length and you are pulling in on it with the winch using the clutch on the "Arizona" as you saw it, in its condition as you found it yesterday, would you say that that clutch would [fol. 490] stay in place without being blocked in?

A. No, it wouldn't stay in. Knowing that the jaw clutch is worn and tapered, it would have a tendency to spring apart, therefore the stick is in there to hold it in place.

Mr. Wallace: That is all.

Recross-examination.

By Mr. Pierce:

Q. You think it would pull apart with the weight of three ton against it?

A. It would, yes.

Q. Supposing, as a matter of fact, this clutch had been used all summer pulling that same load in and that the members of the crew said it did not slip at any time, you still think you would be right in saying that it would slip although they said it would not?

A. I believe it would.

Q. Even though it had not slipped in lifting up the load 150 times during the whole season, you still think you are right in saying it would slip?

A. When the jaws are worn the taper can't help but pull apart.

Q. Now, these marks that you made here, what are the lengths of the jaws on the clutch on the boat?

A. They are inch and a half deep.

Q. What was the depth of the jaws on this model?

A. I'd say approximately about an inch.

Q. And on the marks you put on there you put the marks on as shown on the inch and a half jaw, didn't you, instead [fol. 491] of reducing it to the same proportion as to the length of the jaw?

A. No, I made it as close as I could see it right there.

Q. To what extent are they worn on the boat?

A. I made it right to size as it is there; on one side it is worn down to a quarter of an inch on top, and tapers down to three-quarters.

Q. But you carried the tapering back here the same distance that it is carried back on the boat, didn't you?

A. It might not be quite as far; I couldn't judge that right there.

Q. And it is not worn back the same distance at all, then, because the clutch on the boat is a half inch deeper, isn't it, so your marks don't show us anything, do they?

A. It shows that it is worn there.

Q. Now, about this handle. You understand that this winch was built on the scale of just one half of the size of the one on the boat; isn't the handle as shown here just one-half as long as the one that you have introduced in evidence?

A. One half; but the angle isn't the same.

Q. Well, in the picture here that counsel showed to you, how much play is there between the winch block and the handle? About six or eight inches?

A. Approximately, yes.

Q. And would six or eight inches move the clutch out and free it?

A. Yes, it would.

Mr. Pierce: That is all.

[fol. 492] Direct examination.

By Mr. Wallace:

Q. Mr. Bolstad, did you make a templet of the worn part of the clutch yesterday?

A. Yes, I took a tracing off with a piece of paper.

Q. Will you produce it, please, Mr. Bolstad?

Mr. Pierce: That is objected to as not proper redirect, may it please the Court.

Mr. Wallace: He has gone into it here to show on his cross examination the discrepancy between his marking on this model, and I think we have a right to show this.

The Court: I sustain the objection. It is not proper rebuttal.

Mr. Wallace: I ask leave of the Court then to interrogate him as a part of my direct examination on this point.

The Court: We do not use terms very aptly. I said "not proper rebuttal"; I did not say not proper redirect. Counsel objected on the ground it was not proper redirect.

(Witness resumes witness chair.)

Q. Calling your attention to Plaintiff's Exhibits "M" and "N", I will ask you to state whether or not they show the discrepancy between the condition as you actually found it on the "Arizona" and the clutch which is attached to Defendants' Exhibit One, the model here before the court?

A. Well, you can see how they are worn here if anybody understands this.

Mr. Pierce: That is not in response to any question, may [fol. 493] it please the Court.

Q. Do they show the difference?

A. Yes, absolutely. It shows how the jaw clutch on the "Arizona" is worn in comparison with the clutch here.

Q. I will ask you to state what Plaintiff's Exhibit "M" is? Which side of the clutch did you get that off of, or did you get it off of the clutch?

A. This is off the drive side of the clutch. It is worn a quarter of an inch on the top, tapered down to about three-quarters; that is on one of the drive sides of the clutch.

Q. And did you make a templet of the other drive side?

A. On the other side it is worn down to three-quarters; instead of the full inch and a half it is three-quarters.

Q. And tell the jury how you made those, just what operation you went through to make them?

A. I laid these down over the jaw-clutch and traced my fingers over the top of them.

Q. Have you marked with pencil on them to show the square of the clutch?

A. I have marked on this one here to show the only face that is left.

Q. Is there any face left on the other?

A. Yes, there is three-quarters of a face; that was straight up and down, this three-quarters.

Q. That is Plaintiff's Exhibit "N", that is right, is it not?

A. Yes, sir.

Mr. Wallace: We offer this in evidence, if the Court please.

Mr. Pierce: That only shows the condition on the extreme [fol. 494] outer edge of the clutch, doesn't it? Did you get any tracing showing that that wearing went all the way through the length of the jaws?

The Witness: The picture shows just the outer edge but it is the same going right through to the bottom.

Mr. Pierce: Have you got any picture showing that?

The Witness: No.

Mr. Pierce: Have you got any picture showing that it is worn on the bottom?

The Witness: No.

Mr. Pierce: That is all that you have shown us is the picture of the corner on one side, then. The rest of the jaw down in here may be all right so far as those pictures are concerned that you showed us?

The Witness: Yes, sir.

(Whereupon impression of clutch referred to was received in evidence and marked Plaintiff's Exhibit "N".)

Q. Mr. Bolstad, what is the fact? Is it all right? Is it worn or not?

A. It is worn right straight through to the bottom.

Q. Right straight through to the shaft, you mean?
A. Right straight through to the shaft, yes.
Q. And worn similar to what you have shown there?
A. Yes.

Mr. Wallace: That is all.

[fol. 495] Recross-examination.

By Mr. Pierce:

Q. Where is the picture of the bottom?
A. I have no picture of the bottom.
Q. You did not take a picture of the bottom. That is all.

Mr. Wallace: Could you take a picture of the bottom?
Mr. Pierce: Well, I mean a drawing similar to this. Did you make a drawing similar to this, of the bottom?
The Witness: Not of the bottom.
Mr. Pierce: That is all.

(Witness excused.)

Einar Erickson, called as a witness on behalf of the plaintiff in rebuttal, after being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wallace:

Q. State your name, Mr. Erickson.
A. Einar Erickson.
Q. What is your business or occupation?
A. Engineer.
Q. What kind of an engineer?
[fol. 496] A. I am an operator of gas and diesel engines on fishing boats.
Q. How long have you been engaged in that business?
A. Twenty years.
Q. On purse seiners?
A. Yes, sir, purse seiners and halibut schooners.
Q. Describe to the jury, Mr. Erickson, what, if any, difference you found actually existing on the "Arizona" when you examined it, if you did examine it, and the model, Defendant's Exhibit One, which is now in court. Will you just

step down here and show the jury what difference you found?

Mr. Pierce: I am going to renew my objection, may it please the Court, upon the theory the model was offered as illustrative, and it is going to be just as sensible to ask an engineer if this model was the same that he found on the boat. Each is put in as illustrative only, and the testimony is positive that it did not pretend to be a reproduction of it but only for illustration purposes.

Mr. Wallace: We are not contending, Mr. Pierce, that it was intended to be an absolute reproduction of it but we have a right to show the difference.

Mr. Pierce: I don't think they have where nobody claims that clutch was in the same condition it was on the boat, and we supplemented it by bringing in men that examined the clutch.

The Court: I overrule the objection.

Q. Did you examine the "Arizona" yesterday, Mr. Erickson?

A. Yes, I was down and had a look at it.

[fol. 497] Q. Now, tell the jury what difference you found, if any?

A. The only difference I found from other winches was that they had a cleat on the side here so they could put a board in here to keep the handle in, and that would lock the clutch down below.

Q. Did you make a templet there at that time, or see one made?

A. I saw one made, yes.

Q. Calling your attention to Plaintiff's Exhibit "L", is that the one that you saw made there at that time?

A. Yes, sir.

Q. Does that correctly illustrate the actual condition?

A. Yes, sir.

Q. That is the size and the shape of the handle?

A. Yes, that is the size and the shape of the handle.

Q. Now, did you observe the clutch?

A. I had a look at it.

Q. State whether or not it was worn?

A. Yes.

Q. And to what extent?

A. I thought it was pretty badly worn.

Q. Would you say from your experience as an engineer on these purse seine fishing vessels that that clutch would, or would not, stay in place while engaged in the operation of pulling in a purse line if it was not locked in place by something?

Mr. Pierce: Objected to; the witness is not proven qualified, and this is not proper rebuttal, and a matter that should have been gone into on direct testimony. If we are going to do this we will be here interminably.

[fol. 498] The Court: It is not proper rebuttal.

Q. You may resume the stand, Mr. Erickson. Did you ever see a purse seine vessel in operation with a block as you have described it there and as shown in Plaintiff's Exhibit "A"?

A. No, I never have.

Mr. Wallace: That is all.

Cross-examination.

By Mr. Pierce:

Q. You have seen it fastened with a wire?

A. I haven't seen it fastened with anything; it's supposed to stay in there if it's in the right shape.

Q. You weren't on the same boat Bolstad was?

A. No.

Q. He said he saw one fastened with a wire. You never happened to see that?

A. No, sir.

Mr: Pierce: That is all.

(Witness excused.)

Mr. Wallace: That is all the rebuttal, if the Court please.

Mr. Pierce: There are several matters to which I would like to direct Your Honor's attention.

The Court: The jury may retire in charge of the bailiff.

(Jury retire to jury room.)

[fol. 499] RENEWAL OF MOTION FOR NON-SUIT

Mr. Pierce: At this time, may it please the Court, the Defendants and each of them challenge the sufficiency of the evidence.

Mr. Wallace: Just one minute, if the Court please. Mr. Pierce, will you let me bring the jury back? This was one piece of proof that we wanted to take just a minute on, and I clearly forgot it until Mr. Zundel called my attention to it. It is clearly rebuttal of testimony of one witness here.

The Court: We will let the jury be out for ten minutes now, and you may make your motion.

Mr. Wallace: I have no objection to that.

Mr. Pierce (continuing): The Defendants challenge the sufficiency of the evidence, and move for a directed verdict for the Defendants and each of them on the grounds and for the reason that the Plaintiff plainly assumed the risks of his employment and that his injury was the result of a risk open and obvious and which he assumed.

We further move the Court, and in the alternative, for an order withdrawing from the jury's consideration any testimony as to the alleged negligence as to the condition of the clutch or the possibility of its slipping, upon the ground and for the reason that there is not a scintilla of evidence here that the condition of the clutch, if it was defective, had anything to do with the injury of this plaintiff; it appearing affirmatively from all of the testimony that the winch was engaged at the time it occurred and was pulling, and the question of whether or not the clutch would under [fol. 500] some circumstances slip has absolutely nothing to do with this case and the jury should not be permitted to consider it in connection with the verdict because it would be extremely prejudicial in that it had no relation to the accident and certainly was not the proximate cause thereof.

We also ask the Court to withdraw from the jury any consideration with reference to the block which appears on the boat in connection with the shut-off lever on the top of the winch because there is not one scintilla of evidence here that the block was in use at the time this accident happened, and the fact that it was there or if it shows that the clutch may have slipped some other time, has nothing to do with this action. In other words, we have here a situation where the counsel have injected into the case an attack upon the equipment without showing any causal connection between that defective equipment and the injury of this plaintiff; not a particle of evidence as to any causal connection. The winch was connected and pulling at the time the man was hurt. The chances are that if that clutch would have only

slipped he would have been better off. Now, if they had any testimony in the world that that block was in place you would have a different situation, but there is not a bit of testimony, and this jury should not be permitted to go into its jury room and speculate as to that.

Further than that, the testimony of every member of the crew was that the winch was stopped almost that quick.

(Argument by counsel.)

We also move the Court for its order withdrawing from the jury and its consideration the cause of action, or the [fol. 501] element of damage predicated upon the failure to perform different medical care than was performed upon the ground that the risk of delayed medical treatment was one of the risks incidental to a seaman's life. Now, I do not want to take the time of this Court repeating the argument made the other day except to state this, and I want to present it to the Court so that we will not make an error, that without any question of a doubt the assumption of risk as shown by the decisions in the Federal Courts,—ignoring our own courts for a moment—is a complete defense, both under the admiralty rules and the common law rules, and has been recognized under the admiralty rules as a complete defense ever since there has been admiralty law.

(Argument by Mr. Pierce.)

RULING OF COURT

The Court: Well, I shall hold those are arguments you should make to the jury. I shall submit this case to the jury.

Mr. Pierce: So that it may be known that I am raising the question that there is absolutely no evidence here upon which the matter should be submitted to the jury as to whether or not the failure of these men to hire an airplane and to clean out that wound, and that was the proximate cause of his death, the testimony of his own doctors and ours is that that germ got in there the very moment that this accident happened.

The Court: You may bring the jury.

(Jury return to jury box.)

The Court: For the purpose of the record, it may show that the matter presented in the absence of the jury is [fol. 502] deemed presented at the close of all the evidence in the case.

EINAR ERICKSON, resumed the stand for further examination in rebuttal on behalf of plaintiff, and testified as follows:

Direct examination.

By Mr. Wallace:

Q. Did you go aboard the "Silverland" this morning?
A. Yes, sir.
Q. Did you examine the winch to ascertain if there was a stick on it similar to the one that you found on the "Arizona" yesterday?

Mr. Pierce: Objected to as incompetent, irrelevant and immaterial, and an endeavor to impeach on a collateral matter.

The Court: It will be sustained on the last ground.
Mr. Wallace: That is all.

(Witness excused.)

The Court: It will take some little time to prepare instructions. I think the jury will have to leave the jury box again. If counsel will present me with some of their copies that I may use some of them we may expedite matters. I was [fol. 503] given the original and one copy by each of counsel. Now, if you have the other copies that are available for use, it will go faster.

(Jury retire to jury room to permit of preparation of instructions.)

[fol. 504] IN SUPERIOR COURT OF SNOHOMISH COUNTY

[Title omitted]

INSTRUCTIONS TO THE JURY

[fol. 505] Instruction No. L1

It is the duty of the court to instruct you as to the law governing the case, and you shall take such instructions to

be the law. You shall consider the instructions as a whole and not pick out any particular instruction and place undue emphasis on such instruction, nor shall any repetition of words be deemed as intended to lend any emphasis to such repeated words.

The court is not permitted to comment on the evidence, and it has not intentionally done so. If it has appeared to you that the court during the trial, or in the giving of these instructions, has commented on the evidence, you shall disregard such comment entirely.

You will also disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the Court, and any evidence which after the admission was stricken by the court.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of the other, and without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You shall not permit sympathy or prejudice to have any [fol. 506] place in your deliberations, for all persons are equal before the law and all are entitled to exact justice.

Instruction No. 2

You are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have a right to consider his demeanor upon the witness stand, the apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates, and the interest, if any, you may believe a witness feels in the result of the trial, and any other fact or circumstance arising from the evidence which appeals to your judgment as in any wise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness

has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely except insofar as the same may be corroborated by other credible evidence in the case.

[fol. 507] Instruction No. 3

The basis of this action is negligence. The plaintiff is not entitled to recover merely because there was an accident, but must prove by a fair preponderance of the evidence that the defendants were negligent in one or more particulars as charged in the complaint, that Mario Anelich suffered injuries, and that the defendants' negligence was the proximate cause of such injuries and the subsequent death.

"Negligence" is the failure to exercise reasonable and ordinary care, and by the term "reasonable and ordinary care" is meant the degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions. Negligence consists in the doing of some act which a reasonably prudent person would not do under the same or similar circumstances, or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is never presumed, but must be established by proof the same as any other fact in the case.

The term "proximate cause" means an efficient cause of the injury and damage, without which such injury and damage would not have been sustained. It is that cause which in a direct, unbroken sequence produces the injury complained of.

The term "fair preponderance of the evidence" means the greater weight of the credible evidence in the case. It is that evidence which fairly turns the scales which were [fol. 508] evenly balanced before its introduction.

Instruction No. 4

The burden is on the plaintiff to establish, by a fair preponderance of the evidence, the material allegations of her complaint that are denied by the defendants in their answer.

Likewise, the burden is on the defendants to prove, by a fair preponderance of the evidence, the material allegations

of their affirmative defenses that are denied in the plaintiff's answer.

You are instructed that if you find the evidence evenly balanced on any issue of fact submitted to you for your determination, so that you can not say that the evidence preponderates in favor of one side as against the other, then as to such issue of fact you will resolve that issue against the one who has the affirmative burden of proof to sustain.

The term "burden of proof" means the obligation to prove or establish a fact or facts by evidence which fairly preponderates over the opposing evidence.

While the party alleging any fact not admitted by the opposite party has the burden of establishing such fact by a fair preponderance of the evidence, it is not essential that it be established by evidence introduced by the party having such burden of proof, but it may be established in whole or in part by evidence introduced by the opposite party.

[fol. 509] Instruction No. 5

You are instructed that the deceased, Mario Anelich, was a seaman on board the defendants' boat and as such was an employee of the defendants. The law imposes upon the employer the duty to use reasonable care in providing the employee with a safe place to work, and the duty to use reasonable care in conducting the work in which he is engaged in such a manner that his employees will not be subjected to unnecessary dangers; and the greater the danger which attends the work to be done, the more imperative is the obligation resting upon him. The employer does not, however, insure the safety of the working place in the sense that he is liable for all defects and dangers. His duty is merely to exercise reasonable care and diligence in providing a safe working place, and in keeping it safe; and if he does this, he discharges his full duty under the law. If he fails to do so, he is liable in damages to any employee who may be injured as a natural and proximate result of his neglect or default.

Instruction No. 6

Before the plaintiff is entitled to recover for wrongful death she must prove by a fair preponderance of the evidence not only that the defendants were negligent in the

manner charged in the complaint and that Mario Anelich was injured as a natural and proximate result of said negligence, but also that he died as a proximate result of such [fol. 510] injuries. To sustain this burden it is not necessary, however, that the plaintiff show that the injuries received resulted in death immediately, nor is it necessary to prove that the injuries received were the sole cause of death, but if the injuries sustained at the time of the accident set in motion other forces which contributed to produce death, then the wrongdoer is liable. When death results from a combination of causes, some of which are wrongful, some of which are natural, the law passes by the natural causes and fastens responsibility for the death on the wrongful cause.

Instruction No. 7

You are instructed that under the law of the sea, or the maritime law, a seaman injured at sea is entitled to receive from the owner of the vessel upon which he is injured medical aid and cure, at least so long as the voyage is continued. The word "cure" as used means proper care of the injured seaman, but not positive cure, which may be impossible. It means, also, reasonable medical assistance and treatment in case of injury. Under this, law the duty that the officers of a ship owe to a seaman is the exercise of ordinary care to furnish such aid and medical treatment as ordinarily prudent persons would under similar circumstances.

A ship, or its owner, cannot be held responsible for an error in judgment on the part of its officers of the ship if their judgment is conscientiously exercised with reference to the conditions existing at the time.

[fol. 511] They are not insurers of a cure and are not required to have the skill or discernment of a surgeon or physician, and in determining whether or not the officers of a ship exercise such care or judgment, you have a right to take into consideration all of the surrounding circumstances, the nature of the injury, the limited knowledge of medicine and surgery which may be reasonably expected by reason of limited knowledge of such officers.

Instruction No. 8

Should you find from the evidence that the owners or officers of the boat might have reduced the possibility of

infection by adopting some other course of action than that pursued by them, they would not be guilty of negligence in that respect provided you find that they exercised ordinary care under the circumstances and conditions as they then existed. Their conduct in that regard is not necessarily to be judged by the facts as they now appear to you, but they are entitled to have their acts considered in the light of the facts as they appeared to them at the time, and if you find that such officers, with their view of all of the circumstances as they were at the time, exercised ordinary care, then the defendants, or such officers, are not guilty of negligence.

Instruction No. 9

The fact, if you find it to be a fact, that blood poisoning developed as a result of the injury sustained by the de- [fol. 512] ceased, does not of and in itself establish negligence on the part of the officers of the vessel in the medical attention furnished to the deceased by such officers. Negligence cannot be inferred from and is not presumed from the failure of one to effect a cure.

Instruction No. 10

As I have already instructed you, the defendant has pleaded that if the deceased was injured his injuries were caused and contributed to by his own careless and negligent act. Contributory negligence as defined in law, is negligence on the part of the injured party which contributed directly and proximately to his injury and death. In many cases contributory negligence on the part of the injured party defeats his recovery entirely without regard to the question whether such negligence was greater or less in degree than the negligence of the defendants. Because the deceased in this case was injured aboard a vessel, the case is governed by the Maritime Law and under the Maritime Law the fact that the injured party may have been guilty of contributory negligence does not bar a recovery unless the injuries were caused solely by his own negligence. When his own negligence merely concurs with that of the defendants it merely operates to diminish the amount of plaintiff's recovery in proportion to the extent to which his own negligence contributed to his injury and death. Applying these rules to the present case, if you find

that the deceased's injuries and death were caused solely by the negligence of the defendants, then your verdict will [fol. 513] be for the plaintiff, and you will assess plaintiff's damages at the full amount which you may find is necessary to compensate plaintiff and her children for deceased's death, as I shall hereafter instruct you upon that subject. If, however, you find that both the deceased and the defendants were negligent, and that the negligence of both the deceased and said defendants contributed to cause the deceased's injuries and death, then your verdict will still be for the plaintiff, and against the defendants, but in assessing plaintiff's damages you will diminish the amount awarded her in the proportion in which you find that deceased's own negligence contributed to his injuries and death. The defendants have the burden of proving contributory negligence on the deceased's part by a fair preponderance of the evidence.

Instruction No. 11

You are instructed that one may not cast the burden of his own protection upon another. He owes a duty to himself. The law does not permit him to close his eye to danger, and then if he is injured as a result of such danger to seek a remedy in damages against another, or be excused from the consequences of his own acts. He must use his own intelligence and faculties for his own protection always.

[fol. 514] Instruction No. 12

If you return a verdict for the plaintiff, it will then be your duty to assess any damage to which you may find her entitled. If any damages are awarded, they must be reasonable. In these cases where damages are sought to be recovered, it is the duty of the court to instruct the jury regarding the measure of damages, but members of the jury must understand that they are not to give damages simply because instructions on that subject have been addressed to them. Instructions regarding measure of damages are intended to apply only in cases where plaintiffs are entitled to a verdict, and the fact that such instructions are being given here is not to be considered by the jury as an intimation on the part of the court that plaintiff is entitled to a recovery. Whether or not plaintiff is entitled

to recover damages in this case is a question for the jury to determine under the court's instructions, from all the facts and circumstances in evidence.

Instruction No. 13

The Court instructs you that in the event you should find for the plaintiff in this case you are the sole and exclusive judges of the amount for which you may find in favor of the plaintiff, and that it is under the law of this case your particular and peculiar duty as a co-ordinate arm of the Court to determine from a fair preponderance of the evidence what is the amount of the pecuniary or money dam- [fol. 515] ages, if any, to be allowed the plaintiff for the benefit of each or any of the persons for whose benefit this action is prosecuted.

Applying this rule to the facts in this case, it is your duty to find what pecuniary loss, if any, the plaintiff, Antonia Anelich, widow of the deceased, suffered by reason of the injuries and subsequent death of her deceased husband and also what pecuniary loss, if any each of the children of the deceased suffered, as a result of the injuries and subsequent death of their father.

Instruction No. 14

I instruct you, as a matter of law, that according to the American experience mortality tables the life expectancy of a normal man in good health, of the age of 44 years, is 25 years.

Instruction No. 15

Evidence has been admitted regarding the normal life expectancy of a man of Mario Anelich's age, and the cost of purchasing certain annuities. This evidence was not admitted as a basis for a mathematical computation of damages, but was offered and admitted solely to assist you, when considered with all the other evidence in the case, in arriving at the amount of your verdict, in the event you should find a verdict in plaintiff's favor. The fact that a man of the age of forty-four years might normally be expected to live 25:00 years is not to be accepted as proof [fol. 516] that Mario Anelich, deceased would have lived that length of time or would have been able to pursue his vocation as a fisherman, or any other vocation, for that

length of time. Neither is it to be accepted as proof that he would have died at the expiration of that time. The mortality tables from which this life expectancy data was taken have been compiled by insurance companies from a study of statistics affecting their own policy holders. This data is all based upon the assumption that the man is an insurable risk in good health. In determining the probable life expectancy of Mario Anelich, deceased, or the number of years that he would probably have been able to pursue his occupation, you must consider all of the evidence in the case bearing upon the condition of his health, his habits of life, the nature of his occupation and all other circumstances which may seem to you to have a bearing upon the probable duration of his useful working life. And in determining the amount of your verdict, if any, you should award to the widow and children a fair and reasonable compensation for that pecuniary damages, if any, they have suffered by reason of the death of their husband and father, taking into consideration what the decedent's income would probably have been, how long it would have lasted and all the contingencies shown by the evidence to which it was liable.

Instruction No. 16

Should you find under the evidence and under these instructions, that the plaintiff is entitled to damages, you are [fol. 517] instructed that the measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the costs of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make their estimate, it is competent to show and for them to consider the age of the deceased, his prospects in life, his habits and character, his industry and skill, the means he had of making money, the business in which he was employed, the possibility of actual sickness, or loss of employment, or voluntary abstaining from work, dullness in business, reduction of wages, the increasing infirmities of old age with any corresponding diminution of earning capacity, and any other causes that may contribute in a greater or less degree to decreasing the gross earnings in the lifetime, the end of it all being to enable the jury to fix upon the income which might reasonably be expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family.

In assessing such damages, you are not to take into consideration any grief or mental suffering on the part of the plaintiff because of his death, or loss of society, companionship or affection. Any damages allowed by you must be strictly limited to the financial loss sustained by the widow and her minor children in no event to exceed the amount alleged by plaintiff, $35000.00.

[fol. 518] Instruction No. 17

You are further instructed, if you find for the plaintiff, you may award to her such an amount as you find from all the evidence, is fair and just compensation for the pain and suffering, if any, endured by Mario Anelich, deceased, from the date of his injuries, Aug. 1, 1933 until his death, Aug. 8, 1933.

Instruction No. 18

Upon retiring to the jury room you will select one of your number as foreman, whose duty it will be to sign whatever verdict you agree upon, or to communicate with the court if necessary. You will be furnished with all of the exhibits, these instructions, as well as two forms of verdict. One form you will use in case you find for the plaintiff, in which event you will fill in the amount you allow her; the other form you will use in case you find for the defendants.

This being a civil case, ten of your number may agree upon a verdict, and when ten of your number have agreed upon a verdict, you will have the same signed by your foreman and return with it into court.

You will now listen to argument of counsel.

(Argument by respective counsel.)

[fol. 519] (Jury retire to consider of their verdict) 4:15 P. M.

Defendants' Exceptions

Mr. Pierce: The Defendants, and each of them, except to the refusal of the Court to give its requested instruction number six reading as follows, to-wit:

"Where an employee is of mature understanding and the dangers of the employment are open to his observation and are apparent, the employer is not responsible for any injury arising therefrom. In other words, every employment has its own peculiar hazards, and the law does not hold the employer liable for such hazards as are ordinarily apparent and usual and naturally belong to the employment",

upon the ground and for the reason that it is apparent from the evidence in this case that the cause of the injury of the plaintiff were hazards incident to the employment, and which the plaintiff assumed.

Defendants except to the refusal of the Court to give Defendant's Requested Instruction Seven, reading as follows, to-wit:

"If you find from a fair preponderance of the evidence that the allegations of the defendants' affirmative defense to the effect that the deceased's injuries were approximately due to risks and hazards which the deceased voluntarily assumed as part of his employment, then your verdict will be for the defendants",

upon the ground and for the reason that an assumption of risk as pleaded in the complaint is a proper defense in this action whether it be under admiralty or common law, and the refusal of the court is directly opposed by the decision of the Supreme Court in the McGinn case in 149 Wash., wherein the rule is laid down that a seaman injured on a vessel assumes all risks which were imposed upon him under the common law.

The Defendants except to the refusal of the Court to give its requested instruction number nine upon the ground [fol. 520] and for the reason that the instruction requested is a proper statement under the doctrine of assumed risk as adopted by the Supreme Court of the State of Washington, and that assumed risk was pleaded in this case and should have been submitted to the jury under the instructions as requested.

The Defendants except to Instruction Number Seventeen, wherein the element of damages for pain and suffering was submitted, upon the ground and for the reason that under the admiralty rule plaintiff is not entitled in this

instance to recover either damages for pain and suffering, or for funeral expenses, and these items should have been withdrawn from the consideration of the jury as requested by Defendant.

Defendants except to the refusal of the Court to give its Requested Instruction Number Twenty-two, said instruction being to the effect that it was improper for the jury to arrive at a verdict by quotient, upon the ground and for the reason that it is the law of the statutory and judicial decisions of this state that a quotient verdict is improper, and the Defendant is entitled to have the instruction as requested given to the jury.

[fol. 521] In Superior Court of Snohomish County

[Title omitted]

Verdict

We, the jury duly empanelled and sworn in the above entitled cause, do find for plaintiff in the sum of Ten thousand-five hundred dollars.

Dated this 17th day of November, 1934.

(Signed) E. W. Hill, Foreman.

[fol. 522] Certificate

State of Washington,
County of Snohomish, ss:

I, Ralph C. Bell, one of the judges of the Superior Court of the State of Washington in and for the County of Snohomish, and the Judge before whom the foregoing cause was tried, do hereby certify that the matters and proceedings contained in the foregoing Statement of Facts are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein; and I do further certify that the same contains all the material facts, matters and proceedings heretofore occurring in said cause, and not already made a part of the record therein.

I do further certify that the foregoing Statement of Facts contains all the evidence and testimony introduced

upon the trial of said cause, together with all objections and exceptions made and taken to the admission or exclusion of testimony, and all motions, offers to prove and admissions upon the trial of said cause; and that the Plaintiff's Exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "K-1", "L", "M", and "N", are all the exhibits offered upon the trial of said cause, together with Defendants' Exhibits "1", "2", "3" and "4".

Done in open court this 2nd day of February, 1935.

Ralph C. Bell, Judge above Court.

Approved February 2, 1935. Chas. A. Wallace, Attorney for Plaintiff.

[fol. 523] **Recital as to Exhibits**

PLAINTIFF'S EXHIBIT "A"

(Photograph)

(Admitted)

[fol. 524] PLAINTIFF'S EXHIBIT "B"

Impression of Clutch

(Admitted)

[fol. 525] PLAINTIFF'S EXHIBIT No. "C"

Model of Boat Winch

(Admitted)

(Contained under separate certification of Clerk.)

[fol. 526] PLAINTIFF'S EXHIBIT "D"

Sketch of Clutch

(Admitted)

[fol. 527] PLAINTIFF'S EXHIBIT "E"

Sketch of Clutch

(Admitted)

[fol. 528] PLAINTIFF'S EXHIBIT "F"

Photograph

(Admitted)

[fol. 529] PLAINTIFF'S EXHIBIT No. "G"

Stipulation of Counsel

(Admitted)

[fol. 530] PLAINTIFF'S EXHIBIT "H"

Bamboo Model of Clutch

(Admitted)

(Contained under separate certification of Clerk.)

[fol. 531] PLAINTIFF'S EXHIBIT "I"

Photograph

(Rejected)

[fol. 532] PLAINTIFF'S EXHIBIT "J"

Photograph

(Rejected)

[fol. 533] PLAINTIFF'S EXHIBIT "K"

Page of Telephone Directory

(Admitted)

[fol. 534] PLAINTIFF'S EXHIBIT "K-1"

Sketch of Clutch

(Admitted)

[fol. 535] PLAINTIFF'S EXHIBIT No. "L"

Cardboard Lever

(Admitted)

[fol. 536] PLAINTIFF'S EXHIBIT "M"

Impression of Clutch

(Admitted)

[fol. 537] PLAINTIFF'S EXHIBIT "N"

Impression of Clutch

(Admitted)

[fol. 538] DEFENDANTS' EXHIBIT No. "1"

Model of Winch of Boat

(Admitted)

[fol. 539] DEFENDANTS' EXHIBIT No. "2"

Sketch of Clutch

(Admitted)

[fol. 540] DEFENDANTS' EXHIBIT No. "3"

First Aid Kit

(Admitted)

(Contained under separate certification of Clerk.)

[fol. 541] DEFENDANTS' EXHIBIT "4"

Map

(Admitted)

(Contained under separate certification of Clerk of Court.)

[fol. 542] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 17, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
DEC 31 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY CO. OF AMERICA,

Petitioners,

vs.

ANTONIA ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON AND BRIEF IN SUPPORT THEREOF.

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GORDON H. SWEANY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY CO. OF AMERICA,

Petitioners,

vs.

ANTONIA ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The "Arizona," Antone Mardesich and wife, and Peter Mardesich and wife, and General Casualty Co. of America, respectfully petition the Court to issue a Writ of Certiorari to the Supreme Court of the State of Washington, requiring that there be certified to this Court for determination by it that certain cause in which the petitioners were appellants and respondent herein was respondent;

being Cause No. 25626 in said Supreme Court of the State of Washington, for the following reasons:

The Supreme Court of the State of Washington has decided in this cause a material and substantial question of law arising under the Jones Act (sec. 33 of Act of Congress of June 5, 1920, 41 Stat. 1007, 48 U. S. C. A. 688) in a way not in accord with the majority of the decisions of the Federal Circuit and District Courts; that the question has not been passed upon or decided by this Court; and that upon such question the decisions of the Circuit and District Courts are in conflict and cannot be reconciled.

The Supreme Court of the State of Washington has decided in this cause two material and substantial questions of admiralty law in conflict with the applicable decisions of this Court and of the lower Federal Courts.

The Supreme Court of the State of Washington has decided in this cause a material and substantial question of law arising under the Jones, or Merchant Marine Act (41 Stat. 1007, 48 U. S. C. A. 688) in a way not in accord with the applicable decisions of this Court.

Said Supreme Court of the State of Washington is the highest Court of that State in which a decision upon such questions could be had.

A.

Summary of Matter Involved.

Antone Mardesich was the owner and his son, Peter Mardesich, was the master of the purse seine fishing vessel "Arizona" during the season of 1933. Mario Anelich, plaintiff's decedent, was a member of the crew of the "Arizona" during that season, serving as winchman, or winch tender. The fishing was done in the waters of Puget Sound.

He was injured during the pursing in, or drawing together and raising, of the net by the winch, receiving an extensive open fracture of his left leg.

The work he was doing and the equipment he was using at the time of his accident were entirely familiar to him. He was an experienced fisherman and winchman and prior to his accident on August 1, 1933, he had assisted in hauling in the net, using the same method of operation and the same equipment, approximately one hundred and fifty times during the 1933 fishing season (R. 234, 235, 293, 307). He received his injury when his leg became entangled in a line which he alone handled and was drawn into the winch (R. 235, 295, 309).

As soon as his peril was seen, the winch was stopped and he was extricated, a tourniquet being placed upon his leg by the members of the crew (R. 306, 308, 312-313, 267). He was transferred to the fastest boat available and taken to the nearest medical attention, at Friday Harbor on the opposite side of San Juan Island from that where the "Arizona" was fishing (R. 82, 253, 254, 317). Enroute a telephone call was placed to the Coast Guard and the cutter of the Coast Guard picked him up that afternoon and took him to the Marine Hospital at Seattle, Washington (R. 254, 264).

He was injured at about 8:30 o'clock A. M. He arrived at Friday Harbor at about 10:30 A. M., and Dr. Sturdevant immediately cleansed and repaired the wound and made him as comfortable as possible (R. 260-261). The cutter arrived at 5:00 P. M., and took him to Seattle where he was received at the Marine Hospital at about 10:30 that evening and put to bed. No operative measures of any kind were taken until the next morning, at which time the leg was set and a cast applied (R. 160, 165). Two or three days

later, a general systemic poisoning became apparent and he died on August 8, 1933, his death being due to septicemia, or blood poisoning (R. 154, 156). These facts are undisputed. References to the record for testimony relevant to the questions herein raised, are made subsequently throughout this petition and the supporting brief.

This action was instituted, under the Jones Act, in the Superior Court of the State of Washington, alleging as the acts of negligence relied upon: That the machinery and equipment which Anelich used was old, worn out, defective, dangerous and unseaworthy; that the place where he was ordered to work and equipment he was ordered to use were defective and dangerous; that no one was in the engine room of the vessel at the time the accident occurred and that due to the defective condition of the machinery, and more particularly the clutch on the winch, the winch could not be shut off on deck; that the consequent delay in shutting off the winch caused the injury. Further, that after the accident the defendants were negligent in their treatment and care of the injured man in not taking him to some other port, or in not calling an airplane to take him to the Marine Hospital in Seattle; and that as a consequence of such negligent treatment, blood poisoning developed, causing his death; that had the defendants not been negligent in such treatment, blood poisoning would not have developed (Complaint. Paragraphs VII, VIII, IX, R. 3-5).

The defendants denied that they were negligent in any respect charged and alleged that the accident was due solely and proximately to the negligence of Anelich and that his injury was due to risks naturally incident to his employment, which were open, obvious and apparent to him and therefore assumed by him as a part of his employment (Answer, R. 8-10).

The trial court refused to grant a non-suit or direct a verdict for the defendants either on the basis of assumption of risk, or of failure to prove negligence proximately causing Anelich's death. As to assumption of risk, the Court stated that in this action, brought under the Jones Act, there could be no assumption of risk of injury as to any defective appliance or unseaworthy quality of the vessel (R. 201, 348, 364). The Trial Court further permitted the jury to decide the issue of negligent treatment (Instruction No. 7, 8, R. 355) and all other questions in the case.

There was a verdict for the Respondent, upon which judgment was entered. On appeal the judgment was affirmed by the Supreme Court of Washington (83 Wash. Dec. 429, 49 Pac. (2) 3, R. 18-24).

B.

Reasons Relied on for Allowance of Writ.

The rulings of the Supreme Court of the State of Washington, of which your petitioners complain and which form the basis for this petition are:

1. In refusing to allow to the defendants the defense of assumption of risk in this action under the Jones Act, and in refusing to hold as a matter of law that Anelich assumed the risk of his injuries;

2. In failing to hold that there was no evidence of negligence on the part of defendants proximately causing the injury of Anelich;

3. In failing to hold that defendants were not negligent in the treatment and care of the injured man;

4. And in allowing the jury to speculate as to whether the negligent treatment, if any, of the injured man caused the blood poisoning resulting in death.

No. 1 presents the question, not yet decided by this Court, of whether the defense of assumption of risk is ever available in an action by a seaman against the owners or master of a vessel, when the seaman alleges that his injuries are due to a defective appliance or to some "unseaworthy condition" of the vessel.

It is conceded that a seaman assumes the ordinary and usual risks of his employment under the Jones Act, *The Cricket,* 71 F. (2) 261 (C. C. A. 9, 1934); *Johnson* v. *U. S.,* 74 F. (2d) 703 (C. C. A. 2, 1935), as well as under the maritime law. *The Iroquois,* 194 U. S. 240, 24 R. C. L. 1171.

It is stated by the Supreme Court of Washington, however, that under neither the maritime law nor the Jones Act can the defense be asserted if an unseaworthy condition is alleged as a cause of the injury—that a seaman, no matter how willingly and eagerly he uses the appliance, with full knowledge of its condition and without compulsion, by order or otherwise, cannot be said to have assumed the risk of injury therefrom.

The decision on this question in actions brought under the Jones Act, making applicable to seamen all the provisions of the Federal Employers' Liability Act, has resulted in apparent conflict between the Federal Circuit and District Courts. *This conflict has never been put at rest by a decision of this Court.* The majority of the courts passing upon the question have construed the Act as providing the seaman with the rights of a railroad employee, and subjecting one who sues thereunder to the same disabilities, including that of being held to assume the ordinary risks inherent in the employment as well as such extraordinary risks, even though created by his employer's negligence, as are open and obvious or are fully known to and appreciated by him. Such courts regard the action,

even though defective equipment is alleged, as based upon *negligence* in the common law sense, and the common law defenses to such an action, except so far as expressly removed by act of Congress, are regarded as applicable. *Southern Railway Co.* v. *Hermans*, 44 F. (2d) 356 (C. C. A. 4, 1930); *M. J. McCahan Sugar Etc. Co.* v. *Stoffel*, 41 F. (2d) 651 (C. C. A. 3, 1930); *Hunt* v. *Hobbs, Wall & Co.*, 42 F. (2d) 437 (C. C. A. 9, 1930); *The Calvert*, 51 F. (2d) 494 (C. C. A. 4, 1931); *The Richelieu*, 48 F. (2d) 497 (C. C. A. 4, 1931); *Stevens* v. *O'Brien & Co.*, 62 F. (2d) 633 (C. C. A. Mass. 1933); *Peterson* v. *Sanford Tug Co.*, 28 F. (2d) 283 (D. C., N. Y. 1928); *The Ipswich*, 46 F. (2d) 136 (D. C., Md. 1930); *The Zealand*, 49 F. (2d) 781 (D. C., N. Y. 1931); *Russell* v. *Pere Marquette Ry. Co.*, 245 Mich. 649, 223 N. W. 230 (1930) Cert. Den. 279 U. S. 864; *Patterson* v. *Cleveland Cliffs Iron Co.*, 27 Ohio App. 316, 174 N. E. 592 (1930); *McGinn* v. *North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113 (1928).

The Circuit Court for the Second Circuit has announced in several cases, however, that in an action under the Jones Act there can be no assumption by the seaman of risk of injury from any defective appliance, which might be said to render the vessel unseaworthy. *Grant* v. *U. S. Shipping Board Emergency Fleet Corp.*, 22 F. (2d) 488 (C. C. A. 2, 1927); *Howarth* v. *U. S. etc. Corp.*, 24 F. (2d) 374 (C. C. A. 2, 1928); *Ives* v. *U. S. etc. Corp.*, 58 F. (2d) 201 (C. C. A. 2, 1932).

To the same effect is *Grimberg* v. *Admiral Oriental S. S. Line*, 300 Fed. 619 (D. C., Wn. 1924). The conflict between the Circuits as herein set forth was recognized in *Pittsburgh S. S. Co.* v. *Palo*, 64 F. (2d) 198 (C. C. A. 1933) and the Court approved the decisions from the Second Circuit, as a matter of pure *dicta*.

The Second Circuit has recently cast doubt upon the ruling which previously was stated as positive law, and

has indicated that the question here raised is an open one even in that jurisdiction. *Scheffler* v. *Moran Towing & Transport Corp., Inc.*, 68 F. (2d) 11 (C. C. A. 2, 1933).

At Maritime Law, aside from the Jones Act, assumption of risk of obvious dangers has been held an available defense, even though such dangers were due to defective machinery or equipment. *The Serapis*, 51 Fed. 91 (C. C. A. 4, 1892); *The Saratoga*, 94 Fed. 221 (C. C. A. 2, 1899); *Cunard Steamship Co.* v. *Smith*, 255 Fed. 846 (C. C. A. 2, 1918); *The Maharajah*, 40 Fed. 784 (D. C., N. Y. 1889); *The Luckenbach*, 53 Fed. 662 (D. C., N. Y. 1892); *The Scandinavia*, 156 Fed. 403 (D. C., Md. 1907) and see *Globe S. S. Co.* v. *Moss*, 245 Fed. 54 (C. C. A. 6, 1917); *Contra*, *Storgaard* v. *France & Canada S. S. Corp.*, 263 Fed. 545 (C. C. A. 2, 1920).

A question of first impression in this Court and of vital importance to every ship owner, and to every seaman, stevedore, harbor worker and fisherman, is presented by this case. It is evident that the Circuit Courts are in conflict. That conflict can only be resolved into certainty by this Court's decision as to whether under the Act of Congress herein termed the Jones Act, and the Federal Statutes thereby made applicable to seamen, the defense of assumption of risk is available to the seaman's employer to the same extent as it is to a railroad employer. This defense, and a right given them by act of Congress, has been denied your petitioners by the Courts of the State of Washington (R. 18, 19; Page 290).

It is conceded that a seaman directly ordered to use defective equipment does not assume the risk of injury therefrom; he has no choice but to obey, or be punished for his disobedience. Here, however, Anelich was no more under compulsion than any shore worker; he was subject to no disciplinary action for disobedience, and could quit at any

time, with daily opportunity to do so, and receive his earned share of the catch (R. 326-328). Under such circumstances, even the Second Circuit would allow the defense of assumption of risk as to open and obvious defects, though caused by the master's negligence; all reason for any difference between the maritime and common law rules is removed. *Skolar* v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893; *Scheffler* v. *Moran Towing and Transportation Co.*, 68 F. (2d) 11; *Johnson* v. *United States*, 74 F. (2d) 703.

II.

It was the theory of the plaintiff's case that the clutch transmitting power to the winch was so worn out and defective that it would not stay engaged unless the clutch lever was braced or locked in position by a stick, forked at one end and resembling a boot jack, which hung beside the winch on a string (R. 240). The argument proceeded that because the stick was in place the lever could not be thrown in to stop the winch and that by reason of the delay in stopping the winch Anelich, after he became entangled in his line, was pulled into the winch. In support of this theory evidence was introduced as to the existence of the stick and the worn condition of the clutch (R. 106, 130, 337). *There was no evidence that the stick was in place on this occasion.*

Men experienced in marine engineering testified that the clutch required nothing to keep it in mesh when the winch was under a load, such as the purse line, as a result of their examination and actual use of the machine (R. 193, 206, 221). There was further testimony that it was common to use such a stick when a winch was to operate steadily for a considerable time under a light load, as under those conditions such a clutch tends to shake and gradually slide out of engagement (R. 209, 240, 291, 298). *Fur-*

ther, there was positive testimony by the crew that the stick was not used when the purse line was being hauled in and that it was not in place at the time of this accident (R. 88, 236, 296.

On this uncontradicted testimony, what evidence is there on which the jury could find that any negligence on the part of the defendant contributed to the injury? The stick was not in place, so that is eliminated. The clutch was somewhat worn and the jury might be entitled to find that under certain circumstances it would eventually disengage—but on this occasion it did not disengage and Anelich was injured because the winch continued to turn. The winch drum revolved at least 90 R. P. M. (R. 223) and it was stopped almost instantly by the engineer below, who heard the shouting (R. 191, 236, 295, 308, 312, 315).

Only by speculation and guess in the face of direct testimony could the jury infer that the stick was in place at the time of the accident. In its absence there is absolutely no evidence of negligence on the part of the defendants contributing to the injury, and under the rule as laid down by this Court in *Northwestern Ry. Co.* v. *Page,* 274 U. S. 65; *Toledo, St. L. & W. R. R.* v. *Allen,* 276 U. S. 165; and *N. Y. Cent. R. Co.* v. *Ambrose,* 280 U. S. 486, the verdict cannot be sustained.

III.

At the trial and on appeal the Petitioners contended that there was no evidence that they were negligent in their treatment of the wounded man or in the course of conduct followed in securing medical attention for him. These are duties imposed by the maritime law on every master and owner of a vessel, and is governed by the law as laid down by this Court in *The Iroquois,* 194 U. S. 240. Failure to carry out these duties constitutes negligence, as

that term is used in the Jones Act. *Cortes* v. *Baltimore Insular Lines*, 287 U. S. 367.

The undisputed evidence, in short, showed that Anelich was immediately transferred to the fastest boat available (R. 82), and made as comfortable as possible (R. 275 and reached competent medical treatment within two hours after the accident, at least an hour before he could have reached such attention had the master of the vessel adopted any of the other courses suggested by counsel for the plaintiff. At the first possible moment telephone conversation was had with the Coast Guard (R. 254), the usual means of transporting injured seaman (R. 24), and by that means Anelich was taken to the hospital in Seattle. It appeared clearly that when medical attention to halt bleeding and infection has been given to such a wound, it is necessary to allow the patient to rest for a considerable period to recover from shock, and that that was done in this case; when he reached the Marine Hospital in Seattle nothing of an operative measure was done until the following morning (R. 160, 165).

The Master and crew of the "Arizona" made no effort to cleanse or repair the wound other than to apply a tourniquet to halt bleeding. Had they done so, without having special training and with only a small first aid kit, it appeared that the likelihood of infection and of greater shock would have been increased (R. 269, 271, 274, 260, 265).

Evidence was admitted over objection as to other possible ports to which he might have been taken, all of which were further away than Friday Harbor, and as to the available airplane service at Seattle (R. 168). By the use of the latter Anelich might have reached the Marine Hospital within three or four hours after the accident, but his immediate need was competent medical attention to his wound, to halt bleeding and infection, and this would have been delayed by following such a course.

Delayed medical treatment and primitive first-aid methods are among the risks a seaman assumes. Clearly the duty the State Court permitted the jury to impose upon the defendants far exceeded that imposed by the Maritime Law as defined by this Court in *The Iroquois,* 194 U. S. 240, of reasonable care and judgment on the part of the master of the vessel under the circumstances. There were other courses of conduct which the defendants might have followed; but only the exercise of reasonable judgment is required, and to hold fishermen on a small boat to a duty as high as that required of the master of a large vessel, trained in first aid and with wireless communication with the shore, is at variance with the law as above stated.

IV.

It has been at all times contended that even if it be assumed that the fishermen should have attempted to cleanse and repair such a wound, or should have known of and called airplane service, yet there is no evidence that the treatment actually given was a proximate cause of the septicemia resulting in death. To charge such results to such treatment is purely speculative and under the law laid down by this Court, a jury's verdict may not rest upon conjecture and speculation. *Chicago, Milwaukee & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 478; *N. Y. Cent. R. Co.* v. *Ambrose,* 280 U. S. 486.

The testimony of each of the four doctors who testified was that in his opinion the organisms which resulted in septicemia causing death entered the wound at the time of the original injury (R. 160, 162, 165, 262, 267, 270, 273). It is undisputed that from such a wound it is extremely likely that septicemia will result under the best of treatment—that septicemia was the most probable result of the injury Anelich received, even if he had been hospitalized

immediately (R. 267, 269). The case is very similar to that of *Cortes* v. *Baltimore Insular Line*, 66 F. (2d) 526 (C. C. A. 2, 1933) in which it was held that in absence of evidence showing with reasonable certainty that defendants' neglect caused the seaman's death, the jury could not return a verdict against the defendants.

There was no evidence on which the jury could do other than speculate as to whether negligent treatment, if any, was the proximate cause of septicemia, as it appeared that with the best imaginable treatment, the chances were that septicemia would result from such a wound. To allow a verdict to rest upon speculation and conjecture of this character is at variance with the law as laid down in *Chicago, Milwaukee & St. P. Ry.* v. *Coogan*, 271 U. S. 472, 478 and other cases cited *supra*, and with the well-reasoned decision of the Second Circuit in *Cortes* v. *Baltimore Insular Line*, 66 F. (2d) 526.

By the verdict based on the rulings of the state court, the defendants are charged with responsibility for a man's death from blood poisoning because of alleged negligent treatment, when it clearly appears that in all probability blood poisoning was the inevitable result of a wound of this character, regardless of treatment or hospitalization. The jury is allowed to speculate in the face of all the medical testimony and to find that had different treatment been given blood poisoning would not have resulted, without any evidence whatsoever upon which to base that finding.

WHEREFORE petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Washington, commanding said Court to send to this Court, on a day certain to be therein designated, a full and complete transcript of record of all its proceedings in said cause, to the end that

the cause may be reviewed and determined by this Court, as provided by law, and that the judgment of the Supreme Court of the State of Washington in this cause may be reversed by this Court.

THE "ARIZONA",
ANTONE MARDESICH AND WIFE,
PETER MARDESICH AND WIFE,
GENERAL CASUALTY CO. OF AMERICA,
By RALPH S. PIERCE,
Counsel for Petitioners.

EDWIN J. CUMMINS,
GORDON H. SWEANY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 667

THE "ARIZONA"; ANTONE MARDESICH AND JANE DOE MARDESICH, HIS WIFE; PETER MARDESICH AND JANE DOE MARDESICH, HIS WIFE; AND GENERAL CASUALTY CO. OF AMERICA,

Petitioners,

vs.

ANTONIA ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED.

BRIEF IN SUPPORT OF PETITION.

Opinion of Court Below.

Supreme Court of the State of Washington: *Anelich* v. *The Arizona et al.*, 49 Pac. Rep. (2d) 3 (R. 18-24).

Basis of Jurisdiction.

The date of judgment of the Supreme Court of the State of Washington sought to be reviewed is October 25, 1935 (R. 25).

The action is one in which rights are claimed by the respondent, plaintiff in the court below, under the Jones, or

the Merchant Marine Act (41 Stat. 1007; 48 U. S. C. A. 688). In the trial court, petitioners by motion for non-suit at the close of the plaintiff's case (R. 200) and by motion for directed verdict at the close of all the evidence in the case (R. 348-351), and by motion for judgment notwithstanding the verdict (R. 13), asked for judgment in their favor upon the ground that under the provisions of the Jones Act, and the Federal statutes by it made applicable to injured seamen, as construed in *Seaboard Air Line* v. *Horton,* 233 U. S. 492; *Delaware, etc., R. R.* v. *Koske,* 279 U. S. 70, the plaintiff's decedent assumed the risk of injury as the injury resulted from an open, obvious hazard, incidental to his employment; and upon the further ground that in this action there was no proof of negligence on the part of the defendants proximately causing the injury to plaintiff's decedent, and that a verdict may not rest upon conjecture and speculation, under *Chicago, M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472; *Northwestern Ry. Co.* v. *Page;* 274 U. S. 65; *Toledo, St. L. & W. Ry.* v. *Allen,* 276 U. S. 165; *N. Y. Cent. R. Co.* v. *Ambrose,* 280 U. S. 486; and upon the further ground that under said act and under the maritime law as laid down in *The Iroquois,* 194 U. S. 240, there was no proof of negligence in the treatment and care afforded the injured man following his injury; and upon the further ground that the verdict that the septicemia or blood poisoning resulting in death was proximately caused by the negligent treatment, if any, of the injured man rested only upon guess and speculation in the face of all the medical testimony, and hence cannot be sustained, upon the authority of *Chicago, M. & St. P. Ry.* v. *Coogan,* and the other cases cited, *supra.*

These motions were overruled. The instruction requested by the defendants upon the question of assumption of risk (R. 12) was refused. Judgment was entered in

the trial court against Petitioners (R. 15). This judgment was affirmed by the Supreme Court of the State of Washington (R. 18-24). Thereafter petition for rehearing was denied (R. 25) and judgment of the Supreme Court of the State of Washington entered October 25, 1935 (R. 25).

Statement of the Case.

Mario Anelich asked for and received employment from Antone Mardesich in the spring of 1933 as fisherman on the latter's purse seine fishing vessel "Arizona" for the coming fishing season (R. 318). Peter Mardesich, the son of the owner, was master of the vessel. Anelich was an experienced fisherman, had followed that work for many years, and had owned his own boat (R. 77, 78, 234, 306, 318). The fishing was on shares, each man receiving one share, and the boat and net four (R. 233-234).

About June 27, 1933, fishing operations began (R. 234). Each member of the crew of eight was assigned definite duties, and Anelich was assigned to tend the rear winch, as he had tended the winch on the boat where he had worked the year before and was an experienced winchman (R. 234, 306). Anelich worked on the rear winch throughout the season until he was injured, and the operation of casting out the net, pursing it and drawing it in with the winch (making a "set") had been performed about 150 times prior to his injury. The operation was always made in the same way (R. 234-235, 293, 307).

As winchman, Mr. Anelich was in charge of the rear drum of the double winch and of the purse line which was hauled in by it; George Brajcich was in charge of the other purse line on the forward drum. The line was taken several turns around the drum, and as the drum revolved the winchman created friction by pulling on the free end of the

line. As the line came in he coiled it behind him. The pulling in of the lines pulled the bottom of the net together, and formed a sack or purse, enclosing the fish. When the net was pursed and had been brought to the surface, the weight of the net was taken on block and tackle from the boom or derrick (R. 56, 230, 294) and it was then the duty of the winchman to clear his respective purse line away from the drum of the winch and from the blocks on the davit on the side of the vessel, so that the net could be lifted above the deck. Throughout this operation the winchmen were in complete control of their respective purselines; no one handled the line on the rear drum of the winch except Anelich (R. 235, 295, 309).

The accident occurred on August 1, 1933, at about 8:30 A. M., while the "Arizona" was fishing along the east side of San Juan Island in Puget Sound, just after the weight of the net had been taken from the purse lines onto the boom (R. 81, 252, 299). His shout of pain was the first intimation that any of the crew near him had that anything was wrong. The winch was halted immediately by the engineer below, who was warned by the shouts of Anelich and the other members of the crew (R. 80, 188, 307, 308, 312, 315). George Brajcich, who handled the forward drum and purse line, seized an axe and cut the aft line, freeing Anelich, who had been caught by the left leg, and then put a tourniquet around his leg above the knee (R. 294-295). He was then transferred to another vessel, the "Congress" by a skiff, as the "Arizona" was completely surrounded by her nets and corks and could neither move nor allow another boat to come alongside without danger of fouling propellors in the nets and disabling one or both vessels (R. 50, 237, 316). The "Congress" was directed to take him to Friday Harbor, on the other side of the island, to the nearest doctor at once. As the "Congress" started to pull away, a fish buyer,

the "Excel II," was seen and as it was a much faster boat (R. 253), Peter Mardesich directed that the injured man be put on board her and taken to the nearest doctor (R. 82, 254, 317). Then the crew of another ship aided those of the "Arizona" to lift her net and the "Arizona" followed at top speed to Friday Harbor (R. 238).

Aboard the "Excel II" was Lee Mackovich, head buyer of the Packing Corporation. He jumped upon a float as the vessel passed Mitchell Bay, about fifteen minutes run from the scene of the accident, directed the captain to proceed at top speed to Friday Harbor, went ashore and walked the necessary quarter of a mile to the nearest telephone. He called the Everett office of his company, on the mainland and directed Morris at that office to call the Coast Guard and have the Coast Guard cutter pick up the injured man at Friday Harbor (R. 254). That call was completed at 9:40 A. M., standard time. The accident had happened at about 8:30 A. M. At ten o'clock the call was completed to the Coast Guard at Port Townsend (R. 290), and the Coast Guard was notified that an injured man from a fishing vessel should be picked up and transported to Seattle to the Marine Hospital at once (R. 289, 322, 323).

At about 10:30 the "Excel II" arrived in Friday Harbor and Dr. Sturdevant was called. He examined the wound, cutting away the trouser leg and exposing it for the first time and then bandaged it hastily and transported the injured man to his office where he did the necessary work of cutting away the dead tissues, sewing up torn muscles and the skin, and bandaging the wound (R. 260). He made no effort to set the broken bone.

Meanwhile the "Arizona" had arrived in Friday Harbor. The officers and crew had been assured both at Mitchell Bay and at Friday Harbor that the Coast Guard was on its way to pick up the injured man (R. 288), and that the cutter

would arrive at noon. When the cutter did not arrive, Peter Mardesich called again at 12:55 o'clock standard time, and Dr. Sturdevant made a third call at 1:08 o'clock (R. 280). In response to these calls the Coast Guard picked up Mr. Anelich at 5:00 P. M., and he was taken ashore at the Marine Hospital in Seattle at 10:45 that evening. He was placed in bed and no operative measures of any kind were taken until nine o'clock the next morning (R. 160, 165). Two or three days later systemic infection developed (R. 154). But for the development of septicemia, or blood poisoning, he would have recovered and had a fairly walkable leg (R. 158). Because of it, however, his condition grew steadily worse and on August 8, 1933, a week after the accident, he died.

The winch in question was located about midship, and on the starboard side of the winch, between the two drums, was a lever by which the clutch of the winch was engaged and disengaged from the main drive shaft. The winchmen stood on the starboard side of the winch, Brajcich slightly forward and Anelich slightly aft of the winch (R. 55, 86). Attached to the winch by a string hung a forked stick, designed to be placed behind the clutch handle to hold it out, in engagement, when the winch was to be used for some little time in stormy weather or without a heavy load (R. 209, 240, 291, 298); it was never used when there was a load, such as the purse line, on the winch and *it was not in place on the day in question,* according to the testimony of the members of the crew (R. 88, 236, 296). The clutch consisted merely of two square jaws, one of which slid into mesh with the other, and if run for a time without a load, would naturally tend to shake apart and disengage. The evidence as to the condition of the clutch was in conflict; considerable testimony was given as to its worn condition, which plaintiff contended would not allow the winch to

operate without some means of actually holding it in engagement (R. 106, 130, 337). The members of the crew, as well as mechanics who had examined and tested the clutch, testified that nothing was used or needed to keep the clutch in gear while the winch was loaded (R. 236, 296, 193, 206, 221, 291, 88), and that the clutch, while not a new one, was in good working condition (R. 193, 206, 221).

Such are the material facts of the case.

The pleadings and the rulings of the courts on the trial and appeal of the case are set forth in the petition under heading "A", and in the interest of brevity will not be repeated here.

Specifications of Error.

1. The Supreme Court of Washington erred in holding that the defense of assumption of risk was not available to the defendants in this action.

2. The Supreme Court of Washington erred in failing and refusing to hold that there was insufficient evidence of negligence proximately causing Anelich's injury to sustain the verdict of the jury.

3. The Supreme Court of Washington erred in failing and refusing to hold that there was insufficient evidence of negligent care and treatment to sustain the jury's verdict.

4. The Supreme Court of Washington erred in failing and refusing to hold that there was no evidence upon which the jury could find that the negligent care and treatment, if any, was the proximate cause of the disease causing the death of Anelich.

Argument.

A. The decision below, holding that assumption of risk is not available to the defendants in this action, decides an

important question of maritime and Federal law, not yet decided by this Court, in a way contrary to and in conflict with the great majority of prior Federal and State decisions and relies only upon cases from the Second Circuit, which state a conflicting, questioned and minority rule.

B. The decision below is contrary to and in conflict with prior Federal and State decisions in allowing the jury to guess and speculate, and to return a verdict against the defendants based upon such conjecture, without substantial proof of negligence on their part,

1. Contributing proximately to the original injury suffered by Anelich,

2. In the care and treatment afforded the injured man, or

3. Contributing proximately to the septicemia ultimately causing his death.

Further, that the decision holds the defendants to a higher degree of care and skill in their treatment of the injured man than that required by the maritime law stated by this Court in *The Iroquois*, 194 U. S. 220, and by other Federal Decisions.

A.

The statute under which this action is brought, herein referred to as the Jones Act, is as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees, shall apply; and in case of the death of any seaman as the result of any such personal injury, the personal representative of such seaman may maintain

> an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. * * *'" (41 Stat. 1007, 48 U. S. C. A. 688.)

The statutes referred to by the Jones Act as made applicable to the seamen are the relevant portions of the Federal Employers' Liability Act (35 Stat. 65; 45 U. S. C. A. 51-59) which provide, in short, that an employee of a common carrier by railroad may recover damages, or in case of his death his personal representative may recover damages, for injuries or death resulting in whole or in part from the negligence of any of the employees of such common carrier or by reason of any defect or insufficiency due to the neglect of the employer in its equipment; that the contributory negligence of the employee shall not bar recovery but shall diminish the amount of the recovery in the proportion to the amount of negligence attributable to the employee; that the employee shall not be held to have assumed the risk where violation by the employer of a safety statute contributed to the injury; and that the defense of fellow servant cannot be available to the master.

This Court has construed the Federal Employers' Liability Act as abolishing the defense of assumption of risk only when a Federal safety statute has been violated, and in all other cases the defense exists as at common law. *Seaboard Air Line* v. *Horton,* 233 U. S. 492; *Jacobs* v. *Southern Railroad Company,* 241 U. S. 229; *Delaware Etc., Co.* v. *Koske,* 279 U. S. 7; *Northwestern Pacific Ry. Co.* v. *Bobo,* 290 U. S. 499. The law as stated in the *Seaboard Air Line Case* is as follows:

> "Some employments are necessarily fraught with danger to the workman; danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are

presumably taken into account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. *But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.''* (Italics ours.)

This Court has never had before it the question here presented, as to whether or not the law as stated in the cases just referred to applies to seamen in an action brought under the Jones Act against his employer. The court below held that neither at maritime law prior to the Jones Act, nor under the Jones Act, did the seaman assume the latter type of risk referred to in the *Seaboard* case and underlined by us. It is our contention that on both points the Supreme Court of Washington was in error.

This Court has had the Jones Act under discussion upon several occasions, but in none of these decisions is there any indication that the defense does not apply with equal force to seamen and shore workers alike.

The first case involving the Act was *Panama Railway Co.* v. *Johnson,* 264 U. S. 375, in which the constitutionality of the Act was passed upon and in which it was said that the statute brought into maritime law new rules drawn from the common law as modified by the Federal Employers' Liability Act. This language is carried on in *Engel* v. *Davenport,* 271 U. S. 33, in which it was said that the action under the Jones Act is based upon negligence and the following language was used:

> "Here the complaint contains an affirmative averment of negligence in respect to the appliance, and, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that act, in which the petitioner, instead of invoking, as he might, the relief accorded to him by the old Maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence—in which he not only assumes the burden of proving negligence but also, under Section 3 of the Employers' Liability Act, subjects himself to a reduction of damages in proportion to any contributory negligence on his part."

If the seaman must assume the burden of proving negligence, and must under Section 3 of the Employers' Liability Act subject himself to a reduction of damages in proportion to any contributory negligence on his part, there seems no reason why under Section 4 of the Employers' Liability Act he would not be held to have assumed the risk to the same extent and under the same circumstances as would a railroad employee. In an action based upon negligence in this common law sense, any question of unseaworthiness, as that term is used in the maritime law, seems unnecessary, as the common law defenses should be applicable except as modified by statute.

In its opinion the Court below makes reference to *The Osceola,* 189 U. S. 158, as supporting its statement as to the general maritime law. In *The Osceola* were stated certain definite propositions of maritime law which could be regarded as settled, but the Court did not undertake to state all the principles of maritime law governing personal injuries to seamen. Contributory negligence has always been regarded in admiralty as a defense, in part, at least, (*The Max Morris,* 137 U. S. 1) yet there is no mention of it in *The Osceola.* Assumption of risk is regarded as peculiarly applicable to seamen, in *The Iroquois,* 194 U. S. 240, and

there is likewise no mention of it in *The Osceola.* The language used by this Court is clear cut and definite and should not be construed as an attempt to cover the whole field of maritime torts in four short propositions.

Moreover, this is a situation in which *The Osceola* is not applicable. That decision was dealing solely with the rights of an injured seaman; and by the admiralty law his personal representatives, upon his death, had no cause of action against the master of the vessel. The cause of action which the seaman had, based upon unseaworthiness, died with him. The Jones Act gave to the seaman *and to his personal representative in case of his death,* a right of action for *negligence,* and it is upon that breach of duty, rather than upon unseaworthiness as defined in *The Osceola,* that this action must be predicated. As was said by this Court in *Lindgren* v. *U. S.,* 281 U. S. 38, 47:

> "Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as hereinabove stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel. The statement in *The Osceola, supra,* 175 on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. Apparently for this reason the words 'at his election,'—which appear in the first clause of Sec. 33 of the Merchant Marine Act, relating to the personal right of action of an injured seaman and, as held in *Pacific Co.* v. *Peterson, supra,* 139, gave him, as alternative measures of relief, 'an election be-

> tween the right under the new rules to recover compensatory damages for injuries caused by negligence, and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness'—were omitted from the second clause of Sec. 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And for the reasons already stated, and in the absence of any right of election, the right given the personal representative by the second clause of Sec. 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the State in which the injury was received."

The right which the respondent here asserts, then, is not one which she would have had prior to the Jones Act, by the maritime law, but is one which is asserted solely and exclusively by virtue of that enactment. *The Osceola,* as is pointed out, *supra,* is not authority for the proposition for which it is cited, and is not here applicable.

The most recent case in which this statute was before this Court for discussion is *Warner* v. *Goltra,* decided Nov. 5, 1934 (— U. S. —, 55 Sup. Ct. 46, 79 L. Ed. 8). It is there said:

> "It (referring to the statute) gives to 'any seaman' injured in the course of his employment, and in case of the death of the seaman, to his personal representatives, a cause of action similar to that given by the statutes of the United States to railroad employees."

It is submitted that the decisions of this Court, insofar as they have indicated the position of the Court upon the question now raised, reflect the opinion that the Act draws

from the common law the rules as embodied in the Federal Employers' Liability Act and the judicial construction placed upon it, and that all of these rules are thereby made a part of the maritime law, to be taken advantage of by seamen to the same extent, and under the same conditions, as railroad employees.

It is conceded by the court below and by respondent that assumption of risk is as to some accidents, at least, an available defense, both under the maritime law and the Jones Act. In *The Iroquois,* 194 U. S. 240, involving a seaman falling from aloft while trimming a sail, this Court stated the law as follows:

> "A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to happen, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risks, is peculiarly applicable to the case of seamen."

See also 24 R. C. L. 1171. And there is no conflict in the cases but that the ordinary risks usual in his employment are assumed. The *Cricket,* 71 F. (2d) 261; *Johnson* v. *U. S.,* 74 F. (2d) 703.

What risk could be more incidental and usual in the employment of a winch tender than that of becoming entangled in the line, which he alone handles, and being drawn into the winch? He knew, appreciated, and assumed the risks of slipping on the wet deck, or of becoming entangled in the line if it kinked or twisted (R. 312). It was the theory of the plaintiff's case that the clutch on the winch was worn out and would not stay in gear, requiring the use of a stick to hold the clutch lever in place; and that by reason of the presence of this stick, the lever could not be thrown out and the clutch disengaged, stopping the winch, in time to avoid the injury (R. 202). Assuming that the jury was entitled to find that the stick was in place at

the time of the accident and that the use of it rendered the winch defective, yet Anelich was an experienced fisherman and winch tender (R. 234, 306); his post, at the time the purse line was coming in and while the net was being raised, was within two or three feet of the clutch lever and the stick, if any, bracing it (R. 54, 86); the same operation had been performed one hundred and fifty times (R. 235, 293). The lever was under the joint control of himself and Brajcich, the other winch tender (R. 293, 295). If the stick was in place, he must have known that fact and further, must have realized the danger, if any, attendant upon its use. The condition was open and obvious, and brought home closer to Anelich, because of his position as winch man, than to anyone else of the vessel except, perhaps, the other winchman, Brajcich. Knowledge and appreciation of obvious dangers, which any prudent man would realize, will be presumed (*Northwestern Ry. Co.* v. *Bobo,* 290 U. S. 499.)

The testimony showed that the first that any of the crew knew of the accident was the decedent's cry of pain (R. 80, 188, 307, 308, 312, 315); the duty of looking out for his safety necessarily rested with himself, as it does with men in every occupation where machinery is involved, and to the same extent.

It is conceded by petitioners that a seaman, being bound to obey the master's orders or suffer punishment for refusal, does not assume the risk of dangerous work which he undertakes at the master's command, or the risk of injuries from defective equipment which he is ordered to use by his superiors; he has no choice but to obey and under such circumstances there can be no voluntary assumption of risk. This is merely an application, however, of the common law rule that the assumption of risk of the master's negligence must be a voluntary act by the servant with knowledge, actual or constructive, of possible danger. An

employee "is not bound to accept his own judgment, at his peril, above that of his superiors." 4 Labatt, Master and Servant, 2nd Edition, P. 3935; *Panama Ry. Co.* v. *Johnson*, 289 Fed. 964 (C. C. A. 2, 1923). The common law rule is extended in maritime situations only to the extent that the seaman's duty to obey is greater and more impelling than is the duty on a shore employee. *Holm* v. *City Service Transport Co.*, 60 F. (2d) 721, (C. C. A. 2, 1932).

Under the maritime law, then, assumption of risk of obvious and open dangers has always been held an available defense to the master or owner of the vessel, unless it is shown that the seaman did not voluntarily assume the risk but was ordered to use the appliance or equipment which proved defective. *The Serapis*, 51 Fed. 91 (C. C. A. 4, 1892); *The Saratoga*, 94 Fed. 221 (C. C. A. 2, 1899); *Cunard S. S. Co.* v. *Smith*, 255 Fed. 846 (C. C. A. 2, 1918); *The Maharajah*, 40 Fed. 784 (D. C., N. Y. 1889); *The Luckenbach*, 53 Fed. 652 (D. C., N. Y. 1892); *The Scandinavia*, 156 Fed. 403 (D. C., Md. 1907) and See *Globe Steamship Co.* v. *Moss*, 245 Fed. 54 (C. C. A. 6, 1917). In fact, as was said by the Washington Court in *McPherson* v. *Twin Harbor Stevedoring & Towing Co.*, 139 Wash. 61, 245 Pac. 747, (1926):

> "The fact is that the rule of liability in admiralty and common law is the same with reference to a safe place to work and the assumption of risk."

Prior to the Jones Act also it was held that when acting in obedience to a direct order, a seaman does not assume the risk of any defective condition in equipment. *LaFourche Packet Co.* v. *Henderson*, 94 Fed. 871 (C. C. A. 5, 1899); *The Colusa*, 248 Fed. 21 (C. C. A. 9, 1918); *Cricket S. S. Co.* v. *Parry*, 263 Fed. 523 (C. C. A. 2, 1930). *Eldridge* v. *Atlas S. S. Co.*, 134 N. Y. 187, 32 N. E. 66 (1892).

Since the passage of the Jones Act, the majority of the courts passing on the question have applied the common law defense of assumption of risk to actions brought by seamen for injuries received from defective appliances or poor working conditions. *Southern Ry. Co.* v. *Hermans*, 44 F. (2d) 356 (C. C. A. 4, 1930); *M. J. McCahan Sugar, etc., Co.* v. *Stoffel*, 41 F. (2d) 651 (C. C. A. 3, 1930); *The Calvert*, 51 F. (2d) 494 (C. C. A. 4, 1931); *The Richelieu*, 48 F. (2d) 497 (C. C. A. 4, 1931); *Stevens* v. *O'Brien & Co.*, 62 F. (2d) 633 (C. C. A. Mass. 1933); *Peterson* v. *Sanford Tug Co.*, 28 F. (2d) 283 (D. C., N. Y. 1928); *The Ipswich*, 46 F. (2d) 136 (D. C., Md. 1930); *The Zealand*, 49 F. (2d) 781 (D. C., N. Y. 1931); *Russell* v. *Marquette Ry. Co.*, 245 Mich. 649, 223 N. W. 230 (1930) Cert. Den. 279 U. S. 864; *Patterson* v. *Ceveland Cliffs Iron Co.*, 27 Ohio App. 316, 174 N. E. 592 (1930).

Typical of these decisions are the following excerpts:

> (Referring to the Jones and Liability Acts:) "The Supreme Court has held that Congress, by eliminating the defense of assumption of risk in the cases indicated, quite plainly intended that in all other cases such assumption should have its former effect as a complete bar to the action. *Seaboard Air Line Ry.* v. *Horton*, 233 U. S. 492, 508. There is no claim in this case of violation of any statute and hence the ordinary common law rule must be given effect. In the cited case the Supreme Court defined the rule and held that it applied in cases under the Federal Employers' Liability Act, even though the master had been guilty of negligence." *Southern Ry. Co.* v. *Hermans*, 44 F. (2d) 366.
>
> "It is, of course, the law that the employer exercise due care to furnish a safe place to work and that a breach of this duty ordinarily gives the injured employee a right of action, but it is equally the law, laid down by the Supreme Court of the United States, that if the employer neglects this duty and the defect and

risk involved in that neglect are obvious to an ordinarily prudent person under the circumstances, and would be observed and appreciated by such person, he assumes the risk, even though it flows from the neglect of duty. * * * He was not acting under the compulsion of an order from a superior officer, which, under some circumstances, prevents the application of the doctrine of assumption of risk." *The Ipswich*, 46 F. (2d) 136.

If, however, the seaman is ordered to use the appliance it has been held under the Jones Act, as it was prior to that enactment, that he does not assume the risk. *Panama R. R. Co.* v. *Johnson*, 289 Fed. 964 (C. C. A. 2, 1923); *Zinnel* v. *U. S. etc. Corp.* 10 F. (2d) 47 (C C. A. 2, 1925); *Coast S. S. Co.* v. *Brady*, 8 F. (2d) 16 (C. C. A. 5, 1925); *U. S. etc. Corp.* v. *O'Shea*, 5 F. (2d) 123 (App. D. C. 1925); *Masjulis* v. *U. S. etc. Corp.* 31 F. (2d) 284 (C. C. A. 2, 1929); *U. S.* v. *Boykin*, 49 F. (2d) 762 (C. C. A. 5, 1931); *Hanson* v. *Luckenbach S. S. Co.*, 65 F. (2d) 467 (C. C. A. 2, 1933); *Johnson* v. *U. S.*, 7 F. Sup. 133 (D. C. N. Y. 1934); *The Mangore*, 1 Fed. Sup. 138 (D. C., Md. 1932); *Lejune* v. *General Pet. Corp.*, 72 Cal. App. Dec. 50, 18 Pac. (2d) 429 (1932); *States S. S. Co.* v. *Berglann*, 41 F. (2d) 456 (Cert. Den. 282 U. S. 868; C. C. A. 9, 1930).

It must be noted that in many of the cases just cited there is a broad statement to the effect that risks of unseaworthiness or of defective appliances cannot be assumed by a seaman; *the facts in each case show that the use made was required by an order given*, and in many of the cases it is recognized that the controlling factor, in holding that the defense does not apply, is the coercion or compelling force upon the seaman by the command, removing all possibility of voluntary assumption of risk.

As opposed to these cases are the following: *Grimberg* v. *Admiral Oriental S. S. Line*, 300 Fed. 619 (D. C. Wn. 1924);

Pittsburgh S. S. Co. v. *Palo*, 64 F. (2d) 198 (C. C. A. 3, 1933); *Storgaard* v. *France & Canada S. S. Co.*, 263 Fed. 545 (C. C. A. 2, 1920); *Grant* v. *U. S. etc. Corp.*, 22 F. (2d) 488 (C. C. A. 2, 1927); *Howarth* v. *U. S. etc. Corp.*, 24 F. (2d) 374 (C. C. A. 2, 1928); and *Ives* v. *U. S.*, 58 F. (2d) 201 (C. C. A. 2, 1932).

The *Grant* case is indicative of these decisions. Quoting:

> "In respect to the defense of assumption of risk, no more need be said than that a ship owner cannot avoid liability for injuries to a seaman by a defective appliance on the grounds that the seaman knew of the defect."

The only cases cited in support of that statement are cases in which the seamen were injured *while obeying an order to use the defective appliance.* In the *Grimberg* case there was no showing that the seaman knew, or had any way of knowing, of the defect causing his injuries, and therefore the doctrine would not have been applicable in any case. In the *Pittsburgh S. S. Co.* case there was no evidence of negligence on the part of the defendant, and the court, merely by way of dicta, recognized the divergent lines of authority and chose to approve the minority rule.

The other four cases all arose in the Second Circuit Court of Appeals, and in the most recent case from that Circuit, it was held that even as to an unseaworthy condition—failure to provide lifelines during a storm—caused by the negligence of the ship and master, the seaman assumed the risk if he voluntarily ventured on deck and attempted to cross the deck in a storm while not acting under any direct order or command. *Johnson* v. *U. S.*, 74 F. (2d) 703 (C. C. A. 2, 1935). The District Court, which had held that the risk was not assumed because it was due to a negligent condition, rendering the vessel unseaworthy, was reversed and the libel was dismissed. (District Court

decision, 7 Fed. Supp. 133.) See further as to the extent to which the Second Circuit has retracted from the broad rule as stated in the *Grant* case, *Holm* v. *City Service Transport Co.*, 60 F. (2d) 721; *Skolar* v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893; *Scheffler* v. *Moran Towing & Transport Co.*, 68 F. (2d) 11. The importance of this question is shown by the number of cases in which it has been raised and the diversity of the holdings upon it.

There are these further facts which indicate that under the rule of any jurisdiction, the defense of assumption of risk was available as against this injury received by Anelich. Anelich, while he was concededly a seaman in the sense in which that word is used in the Jones Act, and was thus entitled to the benefits of that Act, was not a seaman in the ordinary sense of the word; he was not subject to disciplinary measures for disobedience; he could quit work when he wished and receive his earned pay; the buyers came alongside at least daily and the boat laid along shore each evening; once a week the boat came into port for a day's holiday; he could disobey orders with no more penalty than any shore employee, and was free to leave the vessel at any time without forfeiture of any of the money he had earned. (R. 326, 233). Under these undisputed facts, any of the Circuits would hold that such an employee assumed risks under the same conditions as a railroad employee. The reason for any distinction is gone, as the controlling element of coercion and enforceable obedience is absent, and any act on the part of Anelich was as voluntary as that of a shore worker. In two recent cases the Second Circuit Court of Appeals has held that members of the crew of tugboats, who are seamen within the sense of the Jones Act, are yet in the class of stevedoring or longshoremen and assume all obvious risks quite as though they were injured on shore. *Skolar* v.

Lehigh Valley Ry. Co., 60 Fed. 893; *Scheffler* v. *Moran Towing & Transport Co.*, 68 F. (2d) 11. As was said in the *Skolar* case,

> "Where a seaman is ordered to use a patently defective appliance or to perform an obviously dangerous act on shipboard, he is not held to have assumed the risk because his duty to obey orders overrides the consent ordinarily implied from knowledge of the danger. See a discussion in *Holm* v. *City Service Transport* Co., 60 F. (2d) 721, decided by this Court July 18, 1932. The case at bar does not fall within the reason of the rule. Here the plaintiff was an extra fireman, employed at an hourly wage with the usual tour of eight hours a day on different tugs of the defendant. He was not supplied with a defective appliance nor ordered to perform a dangerous duty which fell to his lot rather than some other member of the crew because of a superior officer's selection. The danger arose from the mechanical design and construction of the fire room. With this he was perfectly familiar and voluntarily took employment under those conditions time after time on at least fifty prior occasions. He did not live on board but at his home in Jersey City; nor had he signed on for any definite voyage of this harbor tug, nor been employed to work on her rather than upon some other of defendant's vessels. Had he refused to go aboard the evening of November 5 when he sought the Auburn out at the dock, it seems extremely doubtful as to whether he would have been subject to the disciplinary penalties of the ordinary seaman. Under such circumstances, an analogy of a stevedore is more persuasive than that of a seaman in determining whether the doctrine of assumption of risk should be applicable."

So also in the *Scheffler* case, speaking of the crew of a tugboat:

> "Such men are in the position of longshoremen or other casual workers on the water (*Skolar* v. *Lehigh*

R. R. Co., 60 F. (2d) 893 (C. C. A. 2); *The Scandinavia* (D. C. 156 F. 403), who assume all obvious risks quite as though they were injured on shore.

"The libellant knew when the tug left that morning that he would be compelled to handle the lines for the absent deck hand, as he had done before. So far as this exposed him to any greater danger than his usual place aft, he acquiesced in the risk. This fulfills all the elements of an assumption of risk and prevents his recovery."

It has been held in many cases that a longshoreman or stevedore, although entitled to seek the benefits of the Jones Act, assumes the risk of injury from defective equipment and the same rules are applied to an action brought by him as are applied to an action brought by a railroad employee. *O'Brien* v. *Luckenbach S. S. Co.*, 293 Fed. 170 (C. C. A. 2, 1923); *DeLuca* v. *Shephard S. S. Co. Inc.*, 65 F. (2d) 566 (C. C. A. 2, 1933); *Lloyd* v. *Hogan & Sons*, 219 N. Y. S. 750, 755; *Long* v. *Silverline*, 48 F. (2d) 15; *The Hindustan*, 37 F. (2d) 932, Aff. 44 F. (2d) 1015; *Yaconi* v. *Brady & Gioe Inc.*, 246 N. Y. 300, 158 N. E. 876; *Jeffries* v. *DeHart*, 102 Fed. 765 (C. C. A. 3, 1900).

Prior to the decision in the instant case, the Washington Supreme Court had, in many cases involving both seamen and stevedores, held that under the Jones Act the defense of assumption of risk was available, as it was before the Jones Act was passed, in cases of maritime torts. *Lundgren* v. *Pacific Coast S. S. Co.*, 103 Wash. 81, 173 Pac. 1023; *Hamre* v. *Rothschild & Co.*, 136 Wash. 522, 240 Pac. 909 (1925); *Kahlstrom* v. *International Stevedoring Co.*, 141 Wash. 374, 250 Pac. 287 (1926); *McGinn* v. *North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113, (1928); *Schotis* v. *North Coast Stevedoring Co.*, 163 Wash. 305, 320, 1 Pac. (2) 221 (1931), and cases cited.

In the instant case the Washington Supreme Court decided a material and important question arising under the

act of Congress herein termed the Jones Act, involving a matter within the exclusive control of that Act, in a way clearly in conflict with the applicable decisions of the Federal Courts and with its own prior decisions. Because of this erroneous construction of a Federal statute, and because this is a question of first impression in this Court and one which is highly important to all maritime workers to have definitely settled, it is urged that this Court should take jurisdiction to review and correct the decision of the Supreme Court of the State of Washington.

B.

1. Upon this point the evidence is undisputed and the principles of law are definitely settled. The question raised and the pertinent authorities are stated in the petition under heading B, II, and in the interests of brevity will not be repeated at this point. The question is one merely of whether an inference based on disputed facts can be drawn in the face of direct and positive disinterested testimony.

2. The duty which the maritime law places upon the master and owners of a vessel to furnish proper medical attendance and treatment has been stated by this Court in *The Iroquois,* 194 U. S. 240, as follows:

> "The duty to provide proper medical attendance and treatment for seamen falling ill or suffering injuries while in the service of a ship has been imposed upon the ship owners of all maritime nations. * * * What is the measure of the master's obligation in cases where a seaman is severely injured while the ship is at sea has been made the subject of discussion in several cases; but each depends so largely upon its own particular facts that the rule laid down in one may afford little or no aid in determining the matter, depending upon a different state of facts. * * * Each case must depend upon its own circumstances, having

> reference to the seriousness of the injuries, the care that could be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the ship owner, the direction of the wind and the probability of its continuance on the same direction, and the fact of whether a surgeon is likely to be found with competent skill to take charge of the case. * * * With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman of the geography and resources of the country. * * * Seafaring life is dangerous, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risk is peculiarly applicable to the case of seamen."

The Iroquois is without doubt the leading case upon the question and as is said therein, reference to other cases is of little value because of the differing facts upon which the decision in each case must depend. All decisions agree, however, that the master is held only to the exercise of reasonable judgment under the circumstances and if that judgment is conscientiously exercised, the master and vessel are not responsible. *The Vanderduyn,* 261 Fed. 887 (C. C. A. 2, 1919); *The Governor,* 230 Fed. 857 (D. C. 1915).

Measured by the standard of care as set forth in these cases, certainly it cannot be said that on the undisputed evidence set forth, the masters and owner of the "Arizona" should be held negligent in their treatment of the wounded man or in the course of conduct followed in securing medical aid for him. It was asserted that the injured man should have been taken to one of several other ports named; it clearly appeared from the evidence that Friday Harbor was the nearest port at which medical attendance could be obtained (R. 330-332) and as was said in *The Iroquois,* the mere fact that plaintiff named several possible ports indi-

cates that there was no one other course which the jury could find as being the only reasonable course under the circumstances. It was also asserted that airplane service should have been called from Seattle, and considerable evidence was allowed as to available airplane service (R. 167 *et seq.*). Not only did the evidence show, however, that the defendants did not know of the available airplane service and had never heard of it (R. 327), but it also appeared without dispute that the earliest time at which a telephone could be reached was 9:40, more than an hour after the accident (R. 279, 281) and that a round trip from Seattle to Friday Harbor could not have been made in less than two hours actual flying time (R. 178). It clearly appears, therefore, that Mr. Anelich received competent medical attention by Dr. Sturdevant at Friday Harbor at 10:30, more than an hour before he could have received such attention had the defendants followed any other course suggested by the respondent here; and that such treatment as Dr. Sturdevant gave him was the standard treatment to be given at the time a doctor first sees such a wound; it is then necessary to allow the patient to rest for a considerable period to recover from stock before any operative measures are taken (R. 22, 166).

The master and crew of the "Arizona" made no effort to cleanse or repair the wound other than to apply a tourniquet to halt bleeding. Had they attempted to clean up the wound, without having special training and with only a small first aid kit, it appeared that the likelihood of infection and greater shock would have been increased (R. 269, 274, 260, 265).

Delayed treatment and medical care is one of the risks a seaman assumes, he expects and assumes that ordinary methods will be utilized by his employer in getting him to medical attention.

It clearly appears from the evidence that the defendants exercised reasonable judgment under the circumstances, and that as a matter of fact, and of law the course which they followed was the reasonable and proper course under the circumstances. Certainly there is no evidence of negligence sufficient to sustain a verdict against them on the basis of careless treatment and judgment on the part of the master of the vessel, under the rules as laid down by this Court in *The Iroquois.*

4. It has been at all times contended by petitioners that even if it be assumed that the fishermen should have attempted to cleanse and repair such a wound, or should have known of and called airplane service, yet there was no evidence that the treatment actually given was a proximate cause of the septicemia resulting in death. The testimony of each of the four doctors testifying in the case was that in his opinion the organisms which resulted in septicemia causing death entered the wound at the time of the original injury (R. 160, 162, 165, 262, 267, 270, 273). It is undisputed that from such a wound it is extremely likely that septicemia will result under the best treatment—that septicemia was the more probable result of the injury Anelich received, even had he been hospitalized immediately (R. 267, 269).

With the uncontradicted evidence herein set forth, the jury could not do other than speculate as to whether the negligent treatment, if any, was the proximate cause of septicemia, resulting in the death of Anelich. The Circuit Court of Appeals of the Second Circuit in *Cortes* v. *Baltimore Insular Lines,* 66 F. (2d) 526, had before it a very similar question, it appearing that the plaintiff's decedent in that case had contracted pneumonia which might have been any one of four types, one of which averaged a fatality of from 70% to 90%. His treatment on board the ship was

careless in the extreme. The courts reversed the ruling of the District Court in allowing the case to go to the jury as follows:

> "Granting that the jury could have found negligence in treatment, was there evidence from which they could have found that such negligence was the cause of death? We think not. * * * If he had a disease so fatal that the chance of recovery was only one to three out of ten, even with the best of treatment, it seems to us pure speculation on the part of the jury to find that the failure to land him at intermediate port or to get him to a hospital more promptly after arrival, or the failure to give him more careful treatment on board ship, was the cause of his death. * * * (The Court pointed out that doctors testified that his chance of recovery would have been increased by reasonable medical treatment on board.) But that is scarcely equivalent to testimony that with reasonable certainty the defendant's neglect can be said to have caused the seaman's death. * * *
>
> "Because on this record a verdict for the plaintiff would be purely speculative, we think there was error in submitting the case to the jury. The causal connection between the defendant's breach of duty and the resulting injury or death must not be left to mere conjecture. *Thorkeldson* v. *Nicholson,* 154 Minn. 106, 191, N. W. 269, 220; *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 478, 46 S. C. 564, 70 L. E. 10, 11; *Ketterer* v. *Armour & Co.,* 247 F. 921, 931, L. R. A. 1918 D. 798 (C. C. A. 2); *N. Y. Cent. R. Co.* v. *Grimstad,* 264 Fed. 334 (C. C. A. 2); cf *Harris* v. *Penn. R. Co.,* 50 F. (2d) 866 (C. C. A. 4)."

The fundamental law as stated in the *Cortes* case, that verdicts cannot rest on mere conjecture and that causal connection must be shown between negligence and injury, is well established both by the decisions of this Court, *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 474, 478, and by the prior decisions of the Supreme Court of Washington.

Huffine v. *Alvin Investment Co.*, 126 Wash. 490, 218 Pac. 194; *Peterson* v. *Great Northern Ry. Co.*, 166 Wash. 538, 7 Pac. (2d) 296. The only case which in any degree supports the position of the respondent and of the court below is the subsequent decision of the District Court in the *Cortes* case upon the retrial (6 Fed. Supp. 604). The principles there stated stand alone and appear in clear conflict with the opinion of the Circuit Court, and with the decisions of this Court. In the instant case, as has been pointed out, all medical testimony agreed that in all probability the wound became infected at the time of the original injury; and it was shown that in wounds such as this septicemia develops in more than half of the cases. If such a percentage arises from the average case in which medical attention is not delayed for any length of time, what would be the percentage under circumstances in which dirty clothing is ground into the wound and if enforced delay of two hours exists before medical attention can be reached? Under such circumstances, the jury can do no more than guess when it states that failure to cleanse the wound on board the vessel, or failure to use an airplane, caused the blood poisoning which resulted in the death of Anelich. Each of the doctors testified that in their opinion the infection got into and was carried through the blood stream at the time of the accident, and even had hospitalization followed *immediately*, it was entirely possible that death would have ensued.

There is absolutely no testimony that negligent treatment, if any, on the part of the defendants can be said *with reasonable certainty* to have been a proximate cause of the decedent's death; on that phase the jury had grounds only for speculation and conjecture, and the court below was in error in holding that a jury question was presented (R. 22).

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors of the Supreme Court of Washington heretofore specified may be corrected and justice done, as of right should be, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Washington and finally reverse it.

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1935

NO. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, and GENERAL CASUALTY COMPANY OF AMERICA, Petitioners,

vs.

ANTONIA ANELICH, as Administratrix of the Estate of Mario Anelich, Deceased, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

---

BRIEF OF PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1935

NO. 667

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vs.

ANTONIA ANELICH, as Administratrix of the Estate of Mario Anelich, Deceased, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF PETITIONERS

BASIS OF JURISDICTION

This is an appeal from the judgment of the Supreme Court of the State of Washington, entered October 25, 1935. Review of this judgment was sought by petition for certiorari which was granted

by this Court on February 17, 1936. The opinion of the Court below may be found as *Anelich v. The "Arizona" et al*, 49 Pac. Rep. (2d) 3, (R. 18-24).

The action is one in which rights are claimed by the respondent, the plaintiff in the court below, under the Merchant Marine Act, popularly termed "The Jones Act" (41 Stat. 1007; 48 U. S. C. A. Sec. 688).

Upon the trial of the cause, the petitioners by motion for non-suit at the close of the plaintiff's case (R. 200) and by motion for directed verdict at the close of all the evidence in the case (R. 348-351) and by motion for judgment notwithstanding the verdict (R. 13) asked for judgment in their favor upon the ground that under the provisions of the Jones Act and the Federal statutes by it made applicable to injured seamen, as construed in *Seaboard Air Line v. Horton*, 233 U. S. 492; *Delaware, etc. R. R. Co. v. Koske*, 279 U. S. 70, the plaintiff's decedent assumed the risk of injury as the injury resulted from an open, obvious hazard, incidental to his employment, and from a danger which was known to or plainly observable by him; and upon the further ground that in this action there was no proof of negligence on the part of the defendants proximately causing the injuries to plaintiff's decedent, and that a jury's verdict may not rest upon conjecture and

speculation, *Chicago M. St. P. Ry. v Coogan*, 271 U. S. 472; *New York Central R. R. Co. v. Ambrose*, 280 U. S. 486; and upon the further ground that under said Act and under the Maritime Law as laid down in *The Iroquois*, 194 U. S. 240, there was no proof of negligence in the treatment and care afforded the injured man following his injury; and upon the further ground that the verdict that the septicemia or blood poisoning resulting in death was proximately caused by the negligent treatment, if any, of the injured man rested upon guess and speculation in the face of all the medical testimony, and hence cannot be sustained, upon the authority of *Chicago, M. S. Paul Ry. v. Coogan*, and *New York Central R. R. Co. v. Ambrose, supra.*

These motions were overruled by the trial court. The instructions requested by the defendants upon assumption of risk were refused. (R. 12, 361.) The Court expressly stated that assumption of risk was not available to the defendants in this case. (R. 201.) Judgment was entered in the trial court upon the verdict of the jury against the petitioners. (R. 15.) This judgment was affirmed by the Supreme Court of the State of Washington. (R. 18-24.) Thereafter petition for rehearing was denied (R. 25) and the judgment of the Supreme Court of the State of Washington was entered.

STATEMENT OF THE CASE

Antone Mardesich was the owner and his son, Peter, was the master of the fishing vessel "Arizona' during the season of 1933. The fishing was done by purse seine in the waters of Puget Sound, Washington. Before the season began, Mario Anelich, respondent's decedent, asked and received employment on board the vessel for the season. (R. 318.) The fishing was on shares, each one of the crew of eight receiving one share and the boat and nets four shares. (R. 233-234.)

Purse Seine fishing requires a net about seventeen or eighteen hundred feet long. (R. 245.) This net is stretched or laid out in a circle in the water by leaving one end with a skiff and circling with the vessel, paying out as she goes, until the skiff is reached again. The bottom of the net is kept down by leads and the top of the net is kept on the surface by corks, strung at intervals. The effect is to form a netted fence around the spot where it is believed the fish are, seventeen or eighteen hundred feet in circumference and about one hundred and thirty or forty feet in depth. (R. 47, 229.)

Running through rings along the bottom of the net is the "purse line". One end of the purse line and of the cork line is retained in the skiff, and when

the circle is complete, they are passed on board. Then the two ends of the purse line are hauled in through blocks hanging from a davit on the side of the vessel, the line sliding through the rings at the bottom of the net and pulling the bottom together the same way as the opening in a tobacco pouch or money sack is closed by pulling the ends of the pouch strings. When the pursing or closing is complete, enclosing the fish from below as well as on all sides, hauling of the purse line is continued until the rings are brought to the surface within reach of the men on board the vessel. Then a bridle or strap is placed around the net and rings, the block and tackle from the boom or derrick on the vessel is hooked into the strap, and the rings and net are thereby lifted still higher. The cork line is then pulled in by hand so that the top and bottom of the net are both on board and the fish are captured. The net is then pulled on board, a little at a time. (R. 47-49; 229-231.)

On board the vessel, about amidships, and about the same distance from the bow and stern, directly aft of the boom or derrick, is a winch having two drums. When the purse line is to be hauled in, one end is taken about each drum three or four turns, and by pulling on the slack ends of their respective lines, the two winchmen, winch tenders, create friction on the revolving drum sufficient to cause the

line to come in, or ease off, causing it to stop coming in, as they wish. As the line comes in the winchmen coil it behind them. When the rings are up the winch is stopped by the engineers below (R. 231), and the winchmen hold the weight of the net and rings while the strap is put around the net and the tackle from the boom hooked on. Then the weight of the net and rings is taken on that tackle and held, by twisting the rope in the tackle together, while the purse lines are removed from the winch drums and the line from the boom is taken around the forward drum to secure power to raise the net still higher. The engine starts. The winchmen, having cleared the purse lines from the drums, cross to the davit and remove the purse lines from the blocks there so that there will be no fouling of lines as the net goes on higher. (R. 230-231.)

The whole operation of laying out and pulling in the net is called "making a set." Each member of the crew had definite duties and a set was always made in the same way. The operation had been performed about 150 times during the season from the time the season opened on June 27, up until August 1. (R. 234-235, 293, 307.)

Mario Anelich, respondent's decedent, was an experienced fisherman and had followed that work for many years. At one time he had owned his own boat.

(R. 77, 78, 234, 306, 318.) The season before he had worked on the winch on another vessel (R. 306), and during the 1933 season he was assigned the same job on the stern drum of the winch of the "Arizona." (R. 234, 306.)

As winchman he was in charge of the stern drum and of the end of the purse line hauled in by it. George Brajcich had the same job on the forward drum. When the net was laid out, Anelich and Brajcich each took his respective purse line several turns around his drum, and proceeded to haul in until the rings came up. Then they held the net until the weight was taken on the boom, and then cleared the purse lines from the drums and from the davit blocks. Throughout the whole operation the winchmen were in complete control of their respective purse lines. No one handled the line on the rear of the winch except Anelich. (R. 235, 295, 309.) The winch drum revolved at a constant speed of about 90 R.P.M. (R. 249.)

On August 1, about 8:30 A. M., the "Arizona" was fishing along the western shore of San Juan Island in Puget Sound. It was a calm, sunny morning. The crew was proceeding with the usual routine and the first set of the morning was almost completed. (R. 235.) George Ruiancich was in the skiff at the stern of the boat and Pete Matiaco, Mike Swalko

and Jack Marincovich were in the stern of the "Arizona" pulling in the cork line and the lines at the end of the net. (R. 305, 306, 312, 314, 315.) The purse line had been pulled in by the winch and the rings had come to the surface. Peter Mardesich slipped the choker or strap around the rings and hooked in the block and tackle from the boot, then twisted the block and tackle so that it would not slip, thus holding the weight of the net and rings. (R. 231.) George Brajcich and Mario Anelich slackened away on the purse line *on which there was no longer weight* and George Brajcich cleared his purse line away from the forward drum. (R. 294.) Antone Mardesich, the owner, who was on the boat for his health only, because of his bad heart (R. 57, 195, 299), decided to lend a hand and took the line from the boom the necessary turns about the forward drum to continue raising the net. (R. 119, 81, 299.) As soon as he had done so, Peter Mardesich allowed the block and tackle to untwist and the net continued to rise. (R. 48, 236, 294, 307.) Peter Mardesich moved back toward the stern of the boat, clear of the net and rings and the heavy leads, which totalled a weight of a ton and a half. (R. 236.) George Brajcich moved over to the davit, directly under the ascending net, to slip his purse line out of the block on the davit. (R. 284.)

Meanwhile, it was the duty of Mario Anelich, plaintiff's decedent, to clear his purse line away from the drum as Brajcich had done and to cross to the davit and clear the block there. (R. 295.) The first intimation that any member of the crew had that he was not doing so was had by Pete Matiaco, who glanced up from his work and saw that Anelich's purse line was tangled, saw Anelich jump, either to avoid it or to attempt to straighten it, saw his left leg become entangled in the twisting and snarling line and saw his leg go over the winch (R. 312.) Anelich shouted in Slavonian, "Mother of mine, my leg is caught—my leg is broken." (R. 243.) Peter Mardesich, about ten feet aft, jumped for the handle of the winch clutch, of which we shall speak more fully hereafter, and found himself entangled in the twisting coils of the purse line. (R. 236.) By the time he got himself free, the winch was stopped by the engineer who was at his post below, and who had been warned by the shouts of Anelich, of Peter Mardesich and of the other members of the crew. (R. 87, 188, 230, 300, 308.) George Brajcich, who was at the davit, turned, seized an axe which was standing against the cabin nearby, and cut Anelich loose by cutting the snarls of the purse line which bound him to the winch drum. (R. 237, 284, 295.) Antone Mardesich, with the ton and a half weight of

the nets and leads suspended above Brajcich and above the boy in the skiff (R. 252), with no way to hold this weight when the winch was thrown out of gear, bound the line he was holding about the framework or bitt of the winch and so held the weight. (R. 81, 86.)

Members of the crew removed Anelich's boot and it was obvious that his leg was badly broken. (R. 308, 313.) George Brajcich applied a tourniquet of rope around his leg above the knee (R. 296, 308) and the men laid Anelich on the deck. Meanwhile, Peter Mardesich, realizing that the "Arizona" could not be moved because of the long line of corks which completely surrounded the vessel and which made it impossible for the "Arizona" to operate her propeller or for any other vessel to come alongside without fouling its propeller and disabling the vessel (R. 237, 316), whistled to the nearest boat for help. (R. 237.) The "Congress" nearby responded and Anelich was immediately transferred to the "Congress" by means of the skiff. (R. 238, 313.) Before the "Congress" got under way, however, Mardesich saw the "Excel II", a fish buyer and a much faster boat than either the "Congress" or the "Arizona," and directed that Anelich be transferred to the "Excel II' and taken to the nearest doctor at once. (R. 317.) Anelich had already been placed on a mattress

on board the "Congress." The "Excel II" came alongside and he was transferred, mattress and all, to the faster boat. (R. 254.) The "Excel II" then proceeded at top speed around the island to Friday Harbor, the nearest medical attention. The crew of another boat assisted that of the "Arizona" in raising her net as quickly as possible, and the "Arizona" proceeded directly to Friday Harbor. (R. 238.)

Meanwhile, on the "Excel II" Lee Mackovich, head buyer for the corporation to which all the fishing vessels sold their fish, and an old friend of Anelich's, had directed the captain of the "Excel II" to proceed with all possible speed to Friday Harbor and had jumped off a float at Michell Bay, about 15 minutes run from where the boats had been fishing. There he went ashore, walked a quarter of a mile to the nearest telephone, and placed a telephone call to his home office in Everett, Washington, upon the mainland, directing them to call the Coast Guard cutter to pick up Anelich and remove him to the Marine Hospital in Seattle. Mr. Mackovich reached a telephone and placed his call at 9:40 A. M. The home office got in touch with the Coast Guard at Port Townsend, by telephone, at 10 o'clock and notified them that an injured man from a fishing vessel should be picked up and transferred to Seattle to the Marine Hospital at once. (R. 254, 256, 280, 281, 288,

322.) Throughout the trip the injured man was attended by Edward Stevens, who did everything to make him comfortable. (R. 275.)

At about 10:30 the "Excel II" arrived in Friday Harbor and Dr. Sturdevant was called to the dock. He went on board and examined the wound to determine its nature and extent, cutting away the clothing and exposing it for the first time. He then bandaged it hastily and transported the injured man to his office where he did the necessary work of cutting away the torn and dead tissue, sewing up torn muscles and the skin and bandaging the wound. He made no effort to set the broken bone: medical practice requires a delay to allow for recovery from shock before that painful job is begun. (R. 132 *et seq*, 258 *et seq.*)

Meanwhile, the "Arizona" had stopped at Mitchell Bay, where her master and owners were informed that the Coast Guard had been called (R. 84); upon reaching Friday Harbor, they received the same assurance and were told that the Coast Guard cutter would arrive at noon. (R. 84.) When the cutter did not arrive, Peter Mardesich called the Coast Guard again at 12:55 P. M. Standard Time (R. 85, 239, 281), and Dr. Sturdevant called at 1:08 Standard Time. (R. 281.) The cutter arrived at about five o'clock (R. 264) and picked up Mr. Anelich, trans-

porting him to Seattle where he was taken ashore to the Marine Hospital at 10:45 that evening. He was placed in bed and no operative measures of any kind were taken until nine o'clock the following morning; the customary and standard treatment of such cases, when the wound has been cleansed and repaired as had been done at Friday Harbor, is to make the injured man as comfortable as possible to permit recovery from the shock. (R. 166, 152.) The next morning the leg was set with good results. Two or three days later Systemic infection developed. (R. 154.) Had septicemia or blood poisoning not developed, he would have recovered and had a fairly useable leg. (R. 158.) Due to the septicemia his condition steadily grew worse and on August 8, 1933, a week after the injury, he died.

These facts are stated at length because it is essential that this Court have before it the complete picture of the work on the fishing boat, as well as a definite idea as to what point in the operation had been reached when this accident occurred. Confusion in times may arise from reading the record because Friday Harbor and the mainland were operating on Daylight Saving Time, while the fishermen, because of tides, were on Standard. (R. 141.)

Considerable reference will be made to a clutch lever on the starboard side of the winch, between the

two drums, by which the clutch of the winch was engaged and disengaged from the main drive shaft. The winchmen stood on the starboard side of the winch, Brajcich slightly forward and Anelich slightly aft of the winch (R. 55, 86). Attached to the winch by a string hung a forked stick, designed to be placed behind the clutch handle to hold it out, in engagement, when the winch was to be used for some little time in stormy weather or without a heavy load (R. 209, 240, 291, 298); it was never used when there was a load, such as the purse line, on the winch and *it was not in place on the day in question*, according to the testimony of the members of the crew (R. 88, 236, 296). The clutch consisted merely of two square steel jaws, one of which slid into mesh with the other, and if run for a time without a load, would naturally tend to shake apart and disengage. The evidence as to the condition of the clutch was in conflict; considerable testimony was given as to its worn condition, which plaintiff contended would not allow the winch to operate without some means of actually holding it in engagement (R. 106, 130, 337). The members of the crew, as well as mechanics who had examined and tested the clutch, testified that nothing was used or needed to keep the clutch in gear while the winch was loaded (R. 236, 296, 193, 206, 221, 291, 88), and that the clutch, while not a

new one, was in good working condition (R. 193, 206, 221).

Such are the material facts of the case.

The pleadings and the rulings of the courts on the trial and appeal of the case are set forth in the petition for certiorari under heading "A", and in the interest of brevity will not be repeated here.

SPECIFICATIONS OF ERROR

1. The Supreme Court of Washington erred in holding that the defense of assumption of risk was not available to the defendants in this action.

2. The Supreme Court of Washington erred in failing and refusing to hold that there was insufficient evidence of negligence proximately causing Anelich's injury to sustain the verdict of the jury.

3. The Supreme Court of Washington erred in failing and refusing to hold that there was insufficient evidence of negligent care and treatment to sustain the jury's verdict.

4. The Supreme Court of Washington erred in failing and refusing to hold that there was no evidence upon which the jury could find that the negligent care and treatment, if any, was the proximate cause of the disease causing the death of Anelich.

ARGUMENT

I.

A

ASSUMPTION OF RISK IS AN AVAILABLE DEFENSE TO THE PETITIONERS.

1. The Law

This action is one for an alleged tort which occurred at sea. These facts alone concededly bring the case within the jurisdiction of the courts of admiralty administering what has come to be known as the Maritime Law, and in absence of statutory enactment, the remedy of the injured person would rest on the Maritime Law alone. In absence of legislation, this action could not be maintained, since the Maritime Law afforded no cause of action for wrongful death. Death of the seaman ended not only his litigation, but that of his heirs on his behalf. *Lindgren v. U. S.*, 281 U. S. 38, 50 Sup. Ct. 207, 74 L. Ed. 686, (1929).

"Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this sugestion is that the prior maritime law, as herein-

above stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel. The statement in *The Osceola, supra,* 175 on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. Apparently for this reason the words 'at his election,'—which appear in the first clause of Sec. 33 of the Marchant Marine Act, relating to the personal right of action of an injured seaman and, as held in *Pacific Co. v. Peterson, supra,* 139, gave him, as alternative measures of relief, 'an election between the right under the new rules to recover compensatory damages for injuries caused by negligence, and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness'—were omitted from the second clause of Sec. 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And for the reasons already stated, and in the absence of any right of election, the right given the personal representative by the second clause of Sec. 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the State in which the injury was received."

Respondent relies, then, in bringing this action upon the Merchant Marine Act—herein referred to, for brevity, as the Jones Act. 41 Stat. 1007, 48

U. S. C. A. 688. The relevant portions thereof are as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees, shall apply; and in case of the death of any seaman as the result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable * * *"

The statutes referred to are the relevant portions of what is known as the Federal Employer's Liability Act, 35 Stat. 65, 45 U. S. C. A. 51-59, which provide in short—

1. That an employee of a common carrier by railroad, or in case of his death his personal representative, may recover damages for injuries or death resulting wholly or in part from the negligence of any of the employees of such common carrier, or by reason of any defect or insufficiency in equipment due to the employer's neglect;

2. That the contributory negligence of the employee shall not bar his recovery but shall work a proportionate diminution of damages.

3. That the employee shall not be held to have assumed the risk where violation by the employer of a safety statute contributed to the injuries; and

4. That the defense of fellow servant is abolished.

No. 3 is our immediate concern. Under it, this court has made definite the law applicable to railway employees; in all cases save where a Federal safety statute has been violated, assumption of risk exists as a defense as at common law. The law was stated in *Seaboard Air Line R. R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635, L. R. A. 1915 C. 1, Ann. Cas. 1915 B. 475 1914, as follows:

"Some employments are necessarily fraught with danger to the workman; danger that must be and is confronted in the line of duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages, and a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. *But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.*" (Italics ours.)

The law was further stated in *Toledo St. Louis and W. R. R. v. Allen*, 276 U. S. 165, 169, 72 L. Ed. 513, 48 S. Ct. 215 (1928).

"This case is governed by that act and the principles of the common law as applied in the courts of the United States. The plaintiff cannot recover in the absence of negligence on the part of the defendant, *Seaboard Airline v. Horton*, 233 U. S. 492, 502, and, except as specified in Sec. 4 of the Act, the employee assumes the ordinary risks of his employment and, *when obvious or fully known or appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees* (citing cases). If, upon examination of the records, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed." (Italics ours.)

To the same effect are the later cases of *Delaware etc. R. R. Co. v. Koske*, 279 U. S. 7, 73, L. Ed. 578, 49 S. Ct. 202 (1929); *Chesapeake & Ohio R. R. Co. v. Kuhn*, 284 U S. 44, 76 L. Ed. 157, 52 S. Ct. 66 (1931); *Northwestern Pacific Ry. Co. v. Bobo*, 290 U. S. 499, 54 S. Ct. 263, 78 L. Ed. 462 (1932).

In its opinion the Court below makes reference to *The Osceola*, 189 U. S. 158, as supporting its statement as to the general maritime law. In *The Osceola* were stated certain definite propositions of maritime law which could be regarded as settled, but the Court did not undertake to state all the principles of maritime law governing personal injuries to seamen. Contributory negligence has always been regarded in

admiralty as a defense, in part, at least, (*The Max Morris*, 137 U. S. 1) yet there is no mention of it in *The Osceola*. Assumption of risk is regarded as peculiarly applicable to seamen, in *The Iroquois* 194 U. S. 240, and there is likewise no mention of it in *The Osceola*. The language used by this Court is clear cut and definite and should not be construed as an attempt to cover the whole field of maritime torts in four short propositions.

Moreover, as pointed out in *Lindgren v. U. S.*, *supra*, this is a situation in which *The Osceola* is not applicable. That decision was dealing solely with the rights of an injured seaman; and by the admiralty law his personal representatives, upon his death, had no cause of action against the master of the vessel. The cause of action which the seaman had, based upon unseaworthiness, died with him.

By the Jones Act, Anelich's personal representatives, he having died as the result of his personal injuries, may maintain an action for damages at law, the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees is applicable.

The right of action thus asserted is identical, conferred by the same section of the Act of Congress,

with that which a railway employee's personal representative might assert; it is for alleged *negligence* on the part of the employer contributing proximately to the employee's injury. Petitioners cannot see any slightest basis for a distinction between the rights of the personal representatives of a railway employee and of a seaman. The former is given a right of action, which he may exercise under certain conditions; the latter, once utterly without remedy, is given the same right as the former, by virtue of the same statute, which he may exercise under the same conditions.

We are not urging that the respondent's right here are in any degree different than Anelich's would have been had he lived; it is absurd to suppose that Congress intended the Jones Act to confer a different right to be exercised under different conditions by the living seaman, than by his personal representatives after his death. The Jones Act gave to his personal representative the identical right possessed by representatives of a railway employee; and it is our position that it also gave to the seaman himself the same rights, to be exercised to the same extent, of a railway employee. Assumption of risk, a common law defense to an action at law for negligence, is available to the employer of railway employees; and it is equally available to the employers of seaman when

an action at law is brought for damages, for negligence under the Jones Act.

The pronouncements of this Court regarding the Jones Act indicate that this is the proper interpretation of the enactment. In *Panama Ry. Co. v. Johnson*, 264 U. S. 375, 68 L. Ed. 748, 44 S. Ct. 391, (1923) in which the constitutionality of the statute was attacked and upheld, it was stated that by it the rules of the common law system are brought into and made a part of the Maritime system.

"Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules, drawn from another system, and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified and not between that law and some non-maritime system.

"The source from which the new rules are drawn contributes nothing to their force in the field to which they are translated. In that field their strength and operation come alogether from their inclusion in the maritime law. *Louisville & N. R. Ry. Co. v. Western Union Telegraph Co.*, 237 U. S. 300, 303. True, they are not in so many words made a part of that law; but our express declarations is not essential to make them such. As originally enacted, Section 20 was part of an act the declared purpose of which was 'to promote the welfare of American seamen.' It then provided that in suits to recover damages for personal injury 'seamen having command shall not be

held to be fellow servants with those under their authority,' and in *Chelentes v. Luckenbach S. S. Co.*, (*supra*), this Court treated it as part of the maritime law, but held it did not disclose a purpose ' to impose upon ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes of employers in respect of their employees on shore.' After that decision the section was reenacted in the amended form hereinbefore set forth as part of an act the expressed object of which was 'to provide for the promotion and maintenance of the American merchant marine.' In that form it makes applicable to personal injuries suffered by seamen in the course of their employment all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employes.' Thus its origin, environment, and subject matter show that it is intended to and does, bring the rules to which it refers into the maritime law * * *"

The distinction drawn between Section 20 as originally enacted as part of an act to promote welfare of seamen and not intended to "impose upon ship owners the same measure of liability for injuries suffered by the crew at sea as the common law prescribes" for shore employers, and the act as it now reads, is clear cut. The measure of liability upon ship owners and railway employers is the same. Respondent's action is based upon negligence, a common law concept, a common law breach of duty, brought into the Maritime Law.

"Here the complaint contains an affirmative averment of negligence in respect to the appliance, and,

having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that act, in which the petitioner, instead of invoking, as he might, the relief accorded to him by the old Maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence—in which he not only assumes the burden of proving negligence but also, under Section 3 of the Employer's Liability Act, subjects himself to a reduction of damages in proportion to any contributory negligence on his part." *Engel v. Davenport*, 271 U. S. 33, 70 L. Ed. 813, 46 S. Ct. 410 (1926).

If the seaman must assume the burden of proving negligence and subjects himself under Section 53 to the defense of contributory negligence, there seems no logical reason why, under Section 54, he does not assume the risk, a common law defense to the common law right he seeks to assert.

This language is carried on in *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 138, 73 L. Ed. 220, 49 S. Ct. 75 (1928), as follows:

"The right to recover compensatory damages under the new rules for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. * * *"

"And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness; * * *"

The latest expression of this Court, *Warner v. Goltra*, 293 U. S., 155, 55 S. Ct. 46, 79 L. Ed. 8 (1935), indicates nothing to the contrary. New rights are given to the seamen, and with these rights, as an integral part of them, are certain disabilities; the "new rules" are those of the common law.

The continued use by certain courts of the term "unseaworthiness" in decisions of cases arising under the Jones Act seems unexplainable; negligence is the only proper term, and unless the seaman is "invoking, as he might, the relief accorded to him by the old Maritime rules," unseaworthiness is not a true part of the picture. We find, however, certain courts, particularly the Second Circuit, stating, in actions brought under the Jones Act, that as to any unseaworthiness or defective conditions of the vessel or equipment, there can be no defense of assumption of risk. *Grimberg v. Admiral Oriental S. S. Line* 300 Fed. 619, (Dis. Ct. Wash.) (1924); *Ives v. U. S.*, 58 Fed. (2d) 201, (C. C. A. 2) (1932).

The majority of courts when confronted with cases under the Jones Act, properly have treated the question of assumption of risk as though common law negligence and its defense, as modified by the Federal Employer's Liability Act, were alone involved.

In re Luckenbach S. S. Co., 16 Fed. (2) 168, 171 (C C. A. 1925), involved a defective winch which gave way, injuring plaintiff, and the Court said that the risk was not assumed as the plaintiff knew nothing of the defect; but there was no intimation that the defense would be inapplicable merely because the vessel was unseaworthy.

In *Peterson v. Sanford Tug Co.*, 28 Fed. (2) 283, (D. C., N. Y. 1928), a seaman, suing under the Jones Act, moved to strike the defense of assumption of risk. The Court denied the motion, in the following language:

"Manifestly, however, the seamen still assumes the ordinary risks of his employment and also those which are obviously or fully known or appreciated, just as the employee of a common carrier would assume certain risks of his employment. *Toledo, Etc., R. R. Co. v. Allen*, 276 U. S. 165, 168, 169."

And in *The Ipswich*, 46 Fed. (2) 136 (D. C., Md., 1930), involving an injury to a seaman due to an alleged defective condition of an engine room, recovery was denied because of the assumption of risk, as follows:

"It is, of course, the law that the employer exercise due care to furnish a safe place to work and that a breach of this duty ordinarily gives the injured employee a right of action, but it is equally the law laid down by the Supreme Court of the United States that if the employer neglects this duty and the defect and risk involved in the neglect are obvious to an ordinarily prudent person under the circumstances, and would be observed and appreciated by such person, he assumes the risk, even though it flows from the neglect of duty. *Southern Ry. Co. v. Hermans* (C. C. A., 4th Circuit), 44 Fed. (2) 366, Decided October 21, 1930. * * * He was not acting under the compulsion of an order from a superior officer, which, under some circumstances, prevents the application of the doctrine of assumption of risk."

The Circuit Court for the 3rd Circuit, in *M. J. McCahan Sugar, Etc., Co. v. Stoffel*, 41 Fed. (2) 651 (1930), in a suit in admiralty under the Jones Act, stated the law, based on decisions in railway cases, to be as follows:

"An employee assumes the risks normally and necessarily incident to his employment, and also the extraordinary risks caused by his master's negligence; yet he assumes the latter only when they are obvious or fully known by him and are such as would be, under the circumstances, seen and appreciated by an ordinarily prudent person."

In *The Richelieu*, or *Cronec v. Ohio R. Co.*, 48 Fed. (2) 497 (C. C. A. 4, 1931), Cert. Den. 279 U. S. 864, it was contended that stevedores assumed the risk of injury from explosive substances in the hold. The Court decided, on common law principles and citing

railway cases, that the risk was not open, obvious, and appreciated and so not assumed. A similar holding is *The Calvert*, 51 Fed. (2) 494 (C. C. A., Md., 1931), and in neither case is it hinted that maritime assumption of risk differs in any respect from that defense at common law. And in *The Zealand*, 49 Fed. (2) 781 (D. C., N. Y. 1931), assumption of risk of injury from faulty rigging was discussed and decided upon the principles set forth in *Delaware, Etc., R. R. Co. v. Koske* (*supra*), 279 U. S. 7, 73 L. Ed. 578, 49 S. Ct. 202.

Stevens v. O'Brien & Company, 62 Fed. (2) 633, (C. C. A., Mass. 1933), presented a situation similar to the present case. The plaintiff was a seaman on defendant's fishing vessel and alleged injuries due to the vessel's unseaworthy condition. The Court below directed a verdict in the defendant's favor on the basis of assumption of risk. The defense had not been pleaded. The Circuit Court, pointing out that the action was under the Jones Act, held that the defense must be pleaded to be available, and although the defense certainly existed, yet the case must be retried to give the plaintiff an opportunity to prepare to meet the proof of assumption of risk if he could do so.

The Cricket, 71 Fed. (2) 261 (C. C. A. 9,1934) held that a heavy sea, which carried away a ladder

to which a seaman was clinging, was one of the many risks assumed by him as incidental to the hard life of a seaman. A similar case is *Maloney v. U. S.*, 7 Fed. Supp. 14, (D. C., N. Y. 1927).

The Circuit Court of the 4th Circuit, in *Southern Ry. Co. v. Hermans*, 44 Fed. (2) 366 (1930), held that the defense existed under circumstances very similar to the instant case. The decedent was a deckhand on defendant's tug, handling certain lines; and while so doing he placed himself in a position, which, due to the peculiar construction of the tug, and defendant's failure to have a lookout, was dangerous and resulted in his death. The Court stated:

"The most difficult question is whether the defendant should have been given a verdict under the doctrine of assumption or risk. * * * Congress by its action has retained the doctrine as a defense available to employers in cases of this sort. * * * (Referring to the Jones and Liability Acts.) The Supreme Court has held that Congress, by eliminating the defense of assumption of risk in the cases indicated, quite plainly intended that in all other cases such assumption should have its former effect as a complete bar to the action. Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 508. There is no claim in this case of violation of any statute and hence the ordinary common law rule must be given effect. In the cited case, the Supreme Court defined the rule and held that it applies in cases under the Federal Employer's Liability Act, even though the master has been guilty of negligence (quoting from the Seaboard case)."

"It must be borne in mind that the negligence charged by the plaintiff, to-wit, the defendant's failure to have a proper lookout, was not a new or unusual circumstance, but characterized the performance of the men on countless previous occasions where the deceased took part, and also that the risks ordinarily attendant thereon, including contact between the vessels as they approached, were obvious to the deceased. Hence there were strong reasons for a directed verdict for the defendant, unless it should appear that some unusual circumstances took place, or some unexpected danger was encountered on the occasion of the injury. * * * The jury should have been explicitly told that even if they found negligence on the part of the captain, still the plaintiff could not recover if Hermans clearly understood the risks attendant upon such negligence and voluntarily assumed them."

State Courts have likewise applied the common law rule of assumption of risk to actions involving maritime torts. The early case of *Anderson v. Clark*, 155 Mass. 368, 29 N. E. 588 (1892) held that a fisherman on a fishing schooner assumed the risk of injury when a defective windlass jammed, as the condition of the windlass was obvious to an experienced seaman such as the plaintiff was shown to be. In a suit under the Jones Act, *Russell v. Pere Marquette Ry. Co.*, 245 Mich. 649, 223 N. W. 230 (1930, Cert. Den. 279 U. S. 864), the Michigan Court took the position that the suit was under the Liability Act, made applicable by the Jones Act and stated the doctrine of assumed risk as being the same as in railway cases.

The Ohio Court of Appeals took the same stand in *Patterson v. Cleveland Cliffs Iron Co.*, 27 Ohio App. 316, 174 N E 592 (1930), in which a seaman claimed a valve in a gangway across an engine, over which he fell, rendered working conditions unsafe and the vessel unseaworthy The Court stated:

"Assuming for the sake of argument that there was duty on the owner to give warning of the existence of the release valve, we are of the opinion that the plaintiff assumed the risk incidental to his employment; that under the circumstances related in the evidence, the existence of the release valve was an obvious risk which, under the Federal Employer's Liability Act, the employee assumed."

And in *Zigler v. Alaska-Portland Packers Assoc.*, 135 Ore. 359, 296 Pac. 38 (1931), an action under the Jones Act, an instruction in part as follows was approved by the Court:

"A man in accepting employment assumes the risks that are usually and ordinarily incident to that kind of work, or such dangers and risks and hazards as are open and obvious to a man of ordinary intelligence and powers of observation."

The State of Washington, prior to the latest decision in this case, had in many cases permitted to the employer of seamen or of other maritime workers the defense of assumption of risk, both before and after the passing of the Jones Act. *Lundgren v. Pacific Coast S. S. Co.*, 103 Wash. 81, 173 Pac. 1023; *Hamre v. Rothschild & Co.*, 136 Wash. 522, 240 Pac. 909

(1925); *Kahlstrom v. International Stevedoring Co.*, 141 Wash. 374, 250 Pac. 287 (1926); *McGinn v. North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113, (1928); *Schotis v. North Coast Stevedoring Co.*, 163 Wash. 305, 320, 1 Pac. (2) 221 (1931), and cases cited.

Assumption of risk is and always has been a maritime defense; that is conceded by respondent and must be. In *The Iroquois*, 194 U. S. 240, 48 L. Ed. 957, 24 S. Ct. 640 (1903), this Court said of a case involving a seaman who fell while trimming a sail:

"A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to happen, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risks, is peculiarly applicable to the case of seamen."

To the same effect is 24 R. C. L. 1171, *The Cricket*, 71 Fed. (2d) 261, C. C. A. 9, (1934); *Maloney v.* U. S. 7, Fed. Sup. 14.

Nor is this confined merely to risks of heavy seas or of falling from aloft, but has been applied in many cases prior to the Jones Act which involved unseaworthy condition of ships or appliances.

In the early case of *The Maharajah*, 40 Fed. 784 (D. C., N. Y. 1889), a suit in admiralty by a longshoreman claiming that a winch on board a vessel was

defective, the Court decided the cases on common law principles and held that "no recovery could be had where the workman voluntarily takes work upon machinery knowing its dangers, and not expecting or relying on any change to be made in it." On similar facts, involving dangerous old style machinery, the Circuit Court of the 4th Circuit reached the same result. *The Serapis*, 51 Fed. 91 (1892). And that same year, the South District Court of New York in *The Luckenbach*, 53 Fed 662, stated, in regard to a claimed negligent condition of a door, as follows:

"I should have found great difficulty in allowing any recovery, as the hatchway and all the arrangements of the room were in no respect out of order, but in the exact condition they were when the libellant engaged work and were physically known to him. The Maharajah, 40 Fed. 184. Aff. 1 U. S. App. 20; Railroad Co. v. McDave, 125 U. S. 564, The Serapis, 51 Fed. 91."

The Saratoga, 94 Fed. 221 (C. C. A. 2, 1899) involved an injury occurring while an unlighted vessel was being loaded at night. The Court said:

"So far as the crew, and the regular gang of workmen from shore, who are familiar with the location and regulation of the hatches, are concerned, their knowledge of the situation and their continuance at work are held to be conclusive evidence that, as to the particular danger of which they were advised, they took their risk. This has been held so many times that it is unnecessary to cite authorities."

And the Circuit Court of the 3rd Circuit stated that common law principles applied in a suit in admiralty for the death of a stevedore aboard ship in *Jeffries v. DeHart*, 102 Fed. 765 (1900).

The clearest discussion of maritime assumption of risk prior to the Jones Act is found in *The Seandinavia*, 156 Fed. 403 (D. C., Me., 1907). The libellant, a fireman on a tug boat, used a ladder which he knew was defective. After pointing out that a seaman acting in obedience to orders does not assume risks involved in so obeying, the Court referred to *The Max Morris*, 28 Fed. 881, in which contributory negligence was held not to bar recovery, and went on as follows:

"The language of the decision shows that the Court did not intend to ignore the recognized features of the law of negligence, nor to disregard the accepted doctrine of assumption of risk. Such intention is not shown in the decisions of the higher Federal Court. In the Dredge case, 134 Fed. 161, the Circuit Court of Appeals of this Circuit refused to apply the doctrine of Davies v. Mann, in a maritime case, but did not intimate that the principles pertaining to assumption of risk ond other well recognized principles of negligence are to be overridden in a court of admiralty. * * * As in the Serapis, supra, if he had taken care he could have used the appliance safely. He knew the ladder better than anyone else, and assumed the risk of its use. His negligence was the immediate and proximate cause of the injury. (Citing cases.)"

Globe S. S. Co. v. Moss, 245 Fed. 54 (C. C. A., Mich. 1917, Cert. Den. 245 U. S. 663) involved a libel in admiralty in which the libellant was injured while attempting to start a defective pump which rendered the vessel unseaworthy. The court applied common law principles to the situation, and discussed assumption of risk on that basis; finding that the risk was not appreciated or knowingly assumed by the libellant, recovery was allowed. In *Cunard S. S. C. v. Smith*, 255 Fed. 846, 849 (C. C. A., 2, 1918), a stevedore working in a hold was held to have assumed the risk of being hit by a load while working short-handed, on the authority of *Butler v. Frazee*, 211 U. S. 454, 467, 29 S. Ct. 136, 83 L. Ed. 288, a leading common law decision on the doctrine of assumption of risk.

Petitioners concede that when a seaman is *ordered* by his superior officer to use defective equipment, and that order is the impelling force causing such use, there is no assumption of the risk of danger from such use. At sea, as ashore, the force of the command deprives the servant's act of the voluntary character which they must have if the risk is to be voluntarily and freely assumed. *Panama Ry. Co. v. Johnson*, 289 Fed. 964 (C. C. A. 2, 1923). As is said in 4 Labatt, Master & Servant, (2nd Ed.) p. 3935, an employee "is not bound to set his own judgment, at his peril, above that of his superior."

Especially is this so of seamen, who are under a sterner duty to obey, by the rigidly enforced regulations of the sea, than are shore employees. As was said in *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187 32 N. E. 66 (1892), where a seaman was commanded to use obviously dangerous machinery:

"He had to choose between present punishment with a possible hope of remote justification, and customary obedience with the hope that by care he would escape injury."

To the extent that a seaman is under a greater and more pressing duty to obey than is a landsman, the defense of assumption of risk is different at sea than on land; exactly in the same way, because of the isolation and the other peculiar circumstances relating to master and crew while at sea, there is a far greater duty upon the master to protect and care for the seaman than there is upon any shore employer. *Warner v. Goltra*, 293 U. S. 155, *supra.* While acting under orders, which he cannot disobey without punishment, the seaman voluntarily assumes no risks from defective equipment or unseaworthy condition.

There are many federal cases which have expressed this position, and have denied the application of the defense because of the order which was the impelling force of the seaman's act.

LaFourche Packet Co. v. Henderson, 94 Fed. 871 (C. C. A. 5, 1899); *Coast S. S. Co. v. Brady*, 8 Fed. (2) 16 (C. C. A., Ala. 1925, Cert. Den. 269 U. S. 578); *U. S., Etc., Corp. v. O'Shea*, 5 Fed. (2) 123, (App. D. C. 1925); *Masjulis v. U. S., Etc., Corp.*, 31 Fed. (2) 284 (C. C. A., 2, 1929); *U. S. v. Boykin*, 49 Fed. (2) 762 (C. C. A., Fla. 1931); *Hanson v. Luckenbach S. S. C.*, Fed. (2) 457 (C. C. A., 2, 1933); *Johnson v. U. S.*, 7 Fed. Supp. 133 (D. C., N. Y. 1934); *Lejeune v. General Pet. Corp.*, 72 Cal. App. Dec. 50, 18 P. (2) 429 (1932). In *States S. S. Co. v. Berglann*, 41 Fed. (2) 456 (Cert. Den. 282 U. S. 868; C. C. A. 9, 1930), the Court stated that a seaman did not assume the risk created by failure to provide lifelines during a storm; it was said that a seaman assumed all ordinary risks of his employment, but that the defense, in view of his enforced obedience and his inability to quit the ship, did not bar recovery for negligent acts on the part of his superior. The element of coercion is stressed.

Other courts have denied the defense in broad language which has given rise to contradiction in the decisions; in cases involving a direct order to do the thing which he was doing when injured, too often it has been said that there can be no defense of assumption of risk by a seaman, without adding the qualification which is implied by the facts in each

case, *"when acting under orders."* Into this class of cases fall the following: *The Colusa*, 248 Fed. 21 (C. A. A. 9, 1918); *Cricket S. S. Co. v. Parry*, 263 Fed. 523 (C. C. A., N. Y. 1920, Cert. Den. 252 U. S. 580); *Panama R. R. Co. v. Johnson*, 289 Fed. 964, (C. C. A., N. Y. 1923); *Zinnel v. U. S., Etc., Corp.*, 10 Fed. (2) 47 (C. C. A., N. Y. 1925); *McGeorge v. Chas. Nelson Co.*, 107 Cal. App. 148, 290 Pac. 15 (1930); *The Mangore*, 1 Fed. Supp. 138 (D. C., Md. 1932).

The first four cases just cited are cited oftener than any others for the general statement that a seaman does not assume the risk of unseaworthiness; and in each, as pointed out, the statement is dicta.

Some seven Federal cases have flatly stated that a seaman does not assume the risk of unseaworthy conditions, even in absence of a direct order to the seaman to use the defective device or conditions. Perhaps there are more which have escaped counsel's diligent search, but an honest and thorough effort has been made to present all of them.

One such case is *Grimberg v. Admiral Oriental S. S. Co.*, 300 Fed. 619 (D. C., Wash. 1924). In support of this decision the Court cites only the case of *Cricket S. S. Co. v. Parry* (*supra*), which was not decided under the Jones Act, and which was intended only to state

that seamen did not assume the risk of injury *while acting in obedience to an order.* (*see Scheffler v. Moran Towing & Transport Corp.*, 68 Fed. (2) 11 (C. C. A., N. Y. 1933). In the *Grimberg* case, further, there apparently was no showing that the seaman had any knowledge of the misplaced iron bar over which he stumbled, and the defect, therefore, was not an obvious one. Another of the seven cases is *Pittsburgh S. S. Co. v. Palo*, 64 Fed. (2) 198 (C. C. A., Ohio 1933) in which there was no evidence of negligence on the part of the defendant; the Court, by way of dicta, recognized the split of authority herein being discussed, and decided on the authority of *Chelentis v. Luckenbach*, 247 U. S. 372, 384, which arose before the Jones Act was enacted, that the Jones Act gave to the seaman a new right without giving any new defenses to his employer, and stated the broad rule as set forth in the *Cricket S. S. Co.* case.

The recent case of the *New Berne*, 80 Fed. (2) 244 (C. C. A., 4, 1935) is contrary to that circuit's prior decision in *Southern Ry. Co. v. Hermans*, 44 Fed. (2) 366 (1930), and, it is submitted, misinterprets the effect of the Jones Act; new rights and new regulations and conditions of those rights were given to the seaman's personal representatives by the Jones Act, and the Act does not merely constitute a regulation of the rights which they already had; they had none.

The other four cases referred to are *Storgaard v. France & Canada S. S. Corp.*, 263 Fed. 545 (C. C. A., 2, 1920; Cert. Den. 252 U. S. 585), which arose before the passing of the Jones Act; *Grant v. U. S. Etc., Corp.*, 22 Fed. (2) 488 (C. C. A., 2, 1927); *Howarth v. U. S. Etc., Corp.*, 24 Fed. (2) 374 (C. C. A., 2, 1928); and *Ives v. U. S.*, 58 Fed. (2) (C. C. A., 2, 1932).

The *Grant* case is indicative of the tenor of these decisions. Quoting:

"In respect to the defense of assumption of risk, no more need be said than that a ship owner cannot avoid liability for injury to a seaman by a defective appliance on the ground that the seaman knew of the defect."

and the only cases cited in support of that statement are cases in which the seamen were injured *while obeying an order to use the defective appliance.* (*Cricket S. S. Co. v. Parry, supra; Panama R. R. Co. v. Johnson, supra; Zinnel v. U. S. Etc., Corp., supra*).

It will be noted that all these cases arose in the same jurisdiction—the Circuit Court of Appeals for the New York or Second Circuit. The same is true of more than half of the Federal cases cited thus far. In determining the weight to be given these cases, then, we should turn to the most recent decisions of that jurisdiction upon the subject. One of these is

the case of *Scheffler v. Moran Towing & Transport Corp., Inc.*, 68 Fed. (2) 11 (C. C. A., 1933) and in that decision Judge Learned Hand expressly questioned whether a seaman assumed the risk of any unseaworthy condition had been decided.

"Our decision in Storgaard v. France and Canada S. S. Corp., 263 Fed. 545, held that the likelihood of injury was not a factor in liability for gear which was unseaworthy, and there would seem to be no distinction between that and a deficient complement. But though the holding certainly went so far, as will appear from the excerpt from the charge below, it is not wholly clear whether we meant to say that an owner was liable for all injuries arising from unseaworthiness, or whether we were invoking the doctrine announced the same day in Cricket S. S. Co. v. Parry (C. C. A.) 263 Fed 523; that is, that a seaman does not assume the risk of defective gear which he is ordered to use at sea. We now reserve the point, being content to leave it open for a case in which it can be more thoroughly presented: * * *"

In the most recent decision of that circuit it was held that even as to an unseaworthy condition—failure to provide lifelines in a storm, caused by the negligence of the ship and master—the seaman assumed the risk where he voluntarily ventured on deck in a storm while not acting under any direct order or command. *Johnson v. U. S.*, 74 Fed. (2) 703 (C. C. A., 2, 1935). The District Court was reversed, it having held that the risk was not assumed because of the unseaworthy condition of the vessel, (7 Fed. Supp. 133) and the libel was ordered dismissed.

Is the doubt expressed in the *Scheffler* case now resolved in favor of the majority holding elsewhere, by the *Johnson case?* It would seem so.

All circuits have, without question, applied the common law defense to cases brought under the Jones Act by stevedores or longshoremen. Although it is unquestioned that these men are seamen within the meaning of the Jones Act, *Warner v. Goltra, U. S.* 55 Sup. Ct. 46, 79, L. Ed. 8 (1935) (*supra*) yet, as was said in *Lloyd v. Hogan & Sons*, 219 N. Y. S. 750, 755,

"There is a line of cases holding that the defense of assumption of risk does not apply to injuries to a seaman on the theory that a seaman is, by the very nature of his employment, compelled to obey the orders of his superior officer. *The stevedore in this case, however, is not a seaman in fact.* He is included as a seaman in name only for the purpose of bringing him within certain munificient provisions of a law enacted for the protection of seamen. *As far as assumption of risk is concerned, it cannot be said as a matter of law, that he is in any different position than an injured railway employee coming under the provisions of the Federal Employer's Liability Act.*" (Italics ours).

Among the cases holding that the common law defense applies with all its force to stevedores are the following: *O'Brien v. Luckenbach S. S. Co.*, 293 Fed. 170 (C. C. A. 2, 1923); *DeLuca v. Shephard S. S. Co. Inc.*, 65 F. (2) 266 (C. C. A. 2, 1933); *Long v. Silverline*, 48 F. (2d) 15; *The Hindustan*, 37 F. (2d)

932, Aff. 44 F. (2d) 1015; *Jeffries v. DeHart*, 102 Fed. 765 (C. C. A. 3, 1900); *Cunard S. S. Co., v. Smith*, 255 Fed. 846 (C. C. A. 2, 1918); *Yaconi v. Brady & Gioe Inc.*, 246 N. Y. 300, 158 N. E. 876.

Recently the Second Circuit has gone so far as to extend the common law defense upon the same reasoning to the crew of tugboats, whose work and life is more like that of shore employees than that of seamen, as the term is usually used.

In *Skolar v. Lehigh Valley R. R. Co.*, 60 Fed (2) 893 (C. C. A., N. Y. 1932) the plaintiff, a fireman on defendant's tug, asserted that he was injured by reason of failure to have proper guard rails in the engine room, making the place a dangerous one in which to work. In holding as a matter of law the plaintiff assumed the risk, the Court used the following language:

"But regardless of whether the Court below was right in holding that there was no evidence of negligence, we think that assumption of risk was a complete defense to the first cause of action. The appellant concedes that this would be so were he a shore worker or a stevedore, but argues that a different rule applies to seamen. *Where a seaman is ordered to use a patently defective appliance or to perform an obviously dangerous act on shipboard, he is not held to have assumed the risk because his duty to obey orders overrides the consent ordinarily implied from knowledge of the danger.* See discussion in Holm v. Cities Service Transport Co., 60 Fed. (2) 721, decided by this Court

July 18, 1932. The case at bar does not fall within the reason of the rule. Here the plaintiff was an 'extra' fireman, employed at an hourly wage with the usual tour of eight hours a day on different tugs of the defendant. He was not supplied with a defective appliance nor ordered to perform a dangerous duty which fell to his lot rather than some other member of the crew because of a superior officer's selection. The danger arose from the mechanical design and constuction of the fire room. With this he was perfectly familiar and voluntarily took employment under those conditions, time after time on at least fifty prior occasions. He did not live on board but at his home in Jersey City; nor had he signed on for any definite voyage of this harbor tug, nor been employed to work on her rather than upon some other of defendant's vessels. Had he refused to go aboard the evening of November 5, when he sought the "Auburn" out at the dock, it seems extremely doubtful as to whether he would have been subject to the disciplinary penalties of an ordinary seaman. *Under such circumstances, an analogy of a stevedore is more persuasive than that of a seaman in determining whether the doctrine of assumption of risk should be held applicable.* See the Marajah, 40 Fed. 784, 785 (D. C. S., N. Y.); Cunard S. S. Co v. Smith, 255 Fed. 846 (C. C. A. 2); Yaconi v. Brady & Gioe, Inc., 246 N. Y. 300, 306, 158 N. E. 876. The facts being undisputed, there was no issue for the jury as to assumption of risk." (Italics ours.)

The third case is *Sheffler v. Moran Towing & Transport Co., supra,* 68 Fed. (2) 11. The cook on defendant's tug while working on deck due to shorthandedness, was injured; the trial judge denied the defense of assumption of risk on the basis that the vessel was unseaworthy. On appeal, the Circuit Court

assumed that the tug was unseaworthy and that condition caused the accident, and denied recovery on the basis of assumption of risk.

"The libellant assumed the risk of the tug's shorthandedness. It is indeed true in general that a seaman at sea does not assume the risk of unseaworthiness, though it be known to him when he embarked (citing the Cricket S. S. Co., the Panama Railroad Co., and Zinnel cases, supra). This does not excuse him, however, when he has an alternative, (Holm v. Cities Etc., Co., 60 Fed. (2) 721; nor does it excuse those who, though strictly seaking they are seamen, are employed upon harbor craft on which they serve only during the day, leaving each night to go home and renewing their work every morning, like other short workmen. Such men are in the position of longshoremen or other casual workers on the water. (Skolar v. Lehigh R. R. Co., 60 Fed. (2) 893 (C. C. A. 2); the Scandinavia (D. C.) 156 Fed. 403), who assume all obvious risks, quite as though they were injured on shore. (Citing cases.) The libellant knew when the tug left that morning that he would be compelled to handle the lines for the absent deckhand, as he had done before. So far as this exposed him to any greater danger than his usual place aft, he acquiesced in the risk. This fulfills all the elements of an assumption of risk and prevents his recovery."

And in *Holm v. Cities Service Transportation Co.*, 60 Fed. (2) 721 (C. C. A., 2, 1932) it was clearly and definitely held that under the Jones Act assumption of risk may be a defense—and in that case it was held to be a defense where a seaman slipped on an oily patch on the deck. We quote at length:

"In Section 4 of the Federal Employer's Liability Act (45 U. S. C. A. Sec. 54) the defense of assump-

tion of risk is taken away only where the violation by a common carrier of a statute enacted for the safety of employees contributed to the injury or death of an employee. Otherwise, it is an available defense. Seaboard Air Line R. R. Co. v. Horton, 233 U. S. 492, 34 S. Ct. 35, 58 L. Ed. 1062, L. R. A. 1915 C, 1, Annotated Cases 1915 B. 475.

"As there was here no violation of such a statute as is mentioned in the Federal Employer's Liability Act, the question of whether assumption of risk is ever a defense under the Jones Act is squarely presented.

"Where a seaman is injured when acting under orders, he does not assume the risk. Panama R. R. Co. v. Johnson (C. C. A.) 289 Fed. 964; Masjulis v. Shipping Board, 31 Fed.. (2) 284 (C. C. A. 2). The defense of assumption of risk is not available when a seaman so injured sues to recover because his duty to obey the order of a superior is so compelling that a rule of law based on the maxim 'violenti non fit injuria' cannot be applied. *Where the conduct of the injured seaman, however, is induced only by his own free will, and he acts to his injury at a time and place where he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land.* In States S. S. Co. v. Berglan, supra, (C. C. A., 41 Fed. (2) 456) it was recognized that a seaman assumed all the ordinary risks of his employment but not those created by the negligence of the persons in charge of the ship, since he could not quit the ship or control the action of his superiors. This was, however, but another application of the principle that a man does not assume a risk forced upon him. In Lynot v. Great Lakes Transportation Corp., 202 App. Div. 613, 195 N. Y. S. 13, it was held that assumption of risk was not a defense under the

Jones Act. This result was reached by reasoning that the defense is not a part of the general law of maritime torts and that the Jones Act works no change in that respect, since the defense is not created by the Federal Employer's Liability Act, but only permitted under common law principles except to the extent forbidden by Section 4 of that statute. Reliance was put on Lafourche Packet Co. v. Henderson, (C. C. A.) 94 Fed. 871, to show that assumption of risk was not a part of the general maritime law. The treatment of assumption of risk in the Lynott case is somewhat too broad, since it leaves out of account that element of coercion which is the basis for the modification of the common law rule as found in the maritime law. Lafourche Packet Co. v. Henderson, supra, makes this feature controlling. It was the principle upon which the decision turned. Henderson was working under orders. That a seaman does not assume the risk of injury caused by the unseaworthiness of the ship or defective appliances even though known to him, Cricket S. S. Co. v. Parry (C. C. A. 263 Fed. 523) is not decisive in this case. Of course, seamen on duty must use what is furnished for their use because they cannot quit, and ship owners cannot relieve themselves of liability to their seamen for injuries caused by the unseaworthiness of their ships or defective appliances which they require seamen with no real choice in the matter to use. *But this doctrine is not to be pressed to the point where a seaman not acting under orders is relieved of the risks incident to his employment which are known and obvious to him. To this extent it has long been a part of the maritime law that seamen do assume the obvious or known risks of their employment.* The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955; States S. S. Co. v. Berglan (C. C. A.) 41 Fed. (2) 456; The Scandinavia (D. C.) 156 Fed. 403." (Italics ours)

With but few exceptions, all of the decisions of the Circuit and District Courts, and without exception, all of the decisions of this Court indicate that the defenses of assumpion of risk and the other common law defenses are equally a part of the maritime law, except insofar as the exigencies of maritime life require an alteration; and so far as assumption of risk is concerned, the only alteration required is that made necessary by the stern duty of obedience upon the part of a seaman to orders from his superior officers. When that factor is removed, so far as assumption of risk is concerned there is no distinction between maritime and common law assumption of risk; and the last cited cases from the Second Circuit illustrate that where the reason for the distinction fails, the distinction also fails.

2. THE FACTS

Bearing the principles stated in the above cases in mind, let us look at the facts and see just what risks are alleged to have contributed to the injuries of Anelich, which are assumed by him.

His work required him to handle a heavy line upon a drum which revolved at a considerable speed. The line, coming directly out of the sea, was always wet, and the deck on which he stood was always wet from

it. (R. 232.) Certainly the risk of getting caught in the twisting line, should it snarl or become kinked by his lack of diligent handling—and that is how Pete Matiaco, the only witness who saw the accident, said it happened (R. 312)—was a risk inherent in the work, obviously a part of it, as much as the danger of falling from aloft is a part of a sails trimmer's duty. Just as plainly the danger of slipping on the wet deck and falling into the winch was an inherent and incidental risk of the employment. Such risks, it is now apparently conceded by Respondent, are assumed; the lower Courts, however, refused to allow the defense even as to these simplest and most natural risks of the employment. All of petitioner's requested instructions on the subject were refused, (R. 360, 12) no instruction was given on the subject, and the trial court held that assumption of risk was not available in any respect.

These risks were incidental and usual in Anelich's employment; he was an experienced man, knew and appreciated the dangers of becoming in some way entangled in the line, and assumed those dangers. The danger was open and obvious. Certainly under the law as laid down by this court in *The Iroquois*, and by the unanimous holdings cited, petitioners were entitled to have the jury instructed that such dangers were assumed by Anelich.

It was one of plaintiff's theories that the clutch on the winch was worn out and would not stay in gear, requiring the use of a stick to hold the clutch lever in place; that by reason of the presence of the stick, the lever could not be thrown in to disengage the clutch and stop the winch in time to avoid the injury. Let us assume for this argument that the jury was entitled to find that the stick was in place and that it rendered the winch defective, such defect causing the injury. This is said to constitute unseaworthiness of the vessel which a seaman does not assume; and the ruling of the lower court in that respect constitutes the most contested question in the case.

The lever, as shown in the pictures (Plaintiff's Exhibits A and F) was within two feet of where Anelich stood while taking in the line; the stick said to have been used hung from a string on the corner of the winch next to him and was inserted, if at all, from his side; he was one of the two men in charge of the winch; he had performed the same operation the same way 150 times, and if the stick was needed on one occasion, it was certainly as necessary on any other; he was an experienced winchman and fisherman; he was not an ignorant alien but an intelligent man in the prime of life who had once owned his own boat. (R. 69.) If the stick was in place on the day in question he must have seen it, and knew and appre-

ciated the dangers, if any, incident upon its use. Certainly the jury would be entitled to infer such knowledge and appreciation from the facts just related.

The simple situation of a man who works upon a simple mechanical device, without complaint of any sort, performing the same operation time after time, is presented by this case. It is difficult to prove the extent of the knowledge a dead man possessed, but a decedent is presumed to be of normal intelligence and to know and appreciate the dangers which an ordinary prudent man in his position would see and grasp. *Northwestern Pac. R. R. Co. v. Bobo*, 290 U. S. 499, 54 S. Ct. 263, 78 L. Ed. 462 (1932).

Under the Employer's Liability act, the employee assumes "when obvious or fully known or appreciated by him, the extraordinary risks and those due to the negligence of his employer and fellow employees." *Toledo St. L. & W. R. R. v. Allen*, 276 U. S. 165, 169 (1928). Respondent brings this action solely by virtue of the Employer's Liability Act made applicable by the Jones Act, and assumption of risk should be an available defense to this obvious risk.

There is no reason in law or in fact why Anelich was not in the same position, so far as this defense is concerned, as a railway employee. He was not acting under orders of any kind. In fact, there was

no marine discipline on the "Arizona" or throughout the fishing fleet. Anelich was not subject to punishment for disobedience of orders; he could quit any time he wished and receive his earned pay with no forfeiture. At least once each day one of the buyers came alongside, and each night the boat anchored at shore. Once a week the crew received a day's holiday ashore. The men were really joint venturers, each receiving his share of the catch. (R. 326, 33.) Where is the rigid iron discipline of the sea, requiring instant obedince and days of enforced labor with the ship's appliances? Surely here, as in the *Skolar* case (60 Fed. (2) 893) "an analogy of a stevedore is more persuasive than that of a seaman in determining whether the doctrine of assumption of risk should be held applicable." Even the Second Circuit, when denying the defense as to a seaman in the usual sense of the word, would have granted it without question as against the man in Anelich's position, who, like a stevedore, is considered a seaman for the benefits of the Jones Act but whose work, for all practical purposes, is no different from that of a shore employee. *DeLuca v. Shepard S. S. Co., Inc.*, 65 Fed. (2) 566, (C. C. A. 2, 1933); *Skolar v. Lehigh Valley Ry. Co.*, 60 Fed. 893; *Scheffler v. Moran Towing & Transit Co.*, 68 Fed. (2) 11 (C. C. A. 2,); *O'Brien v. Luckenbach S. S. Co.*, 293 Fed. 170 (C. C. A. 2, 1923).

Petitioner's rights were seriously impaired and a defense given to them by Federal enactment was taken away by the state courts when the defense of assumption of risk was refused. The instruction requested (No. 7, R. 12) properly stated the doctrine under the decisions of the Washington courts, *McGinn v. North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113 (1928), and of this Court under the decisions cited, *supra.*

These arguments apply equally to the charge that petitioners were negligent in having an engineer who did not speak Slavonian. This seems to petitioners absurd; a cry of pain is the same in any language, and at any rate the engineer received his orders direct from the captain.

Another risk assumed by Anelich was the danger, in case of injury, of having such injuries treated by primitive first aid methods and of delay in securing medical attention. These are risks incidental to and a part of the employment of every man who works away from centers of civilation ,and are exactly the type of risk referred to in *The Iroquois*, 194 U. S. 240, *supra*, where this court said:

"Seafaring life is dangerous, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risk is pecu-

liarly applicable to the case of seamen." See also, *The Cricket*, 71 Fed. (2) 261 (C. C. A. 9, 1934).

Petitioners were charged with negligence in their care and treatment of the injured man, and with negligence in securing him medical attention; and in defense, assumption of risk was available according to the holdings of the Court.

B.

THE DEFENSE, ON THE ADMITTED FACTS, IS A COMPLETE DEFENSE AS A MATTER OF LAW.

That the denial of the defense was error seems to petitioners inescapable. There can be no question but that the jury, had they been advised of petitioners' defense, had before them ample facts to justify a verdict for the defendants on the basis of assumption of risk. Petitioners strongly and sincerely contend that the admitted facts show, *as a matter of law*, that the danger which caused Anelich's injury and death was one which he assumed and one which was always present during the 150 times the operation had been repeated.

We have fully presented the facts heretofore; repetition would be useless extravagence of time. Respondent concedes the essential facts — (Brief opposing certiorari p. 5).

"Anelich became injured in the following manner: A part of the purse line which he was collecting and coiling became entangled, and he jumped to one side to avoid it, but failed, and then his left leg got caught in the line * * *."

Caught in a line which he alone handled and which he allowed to became entangled; drawn into the winch drum revolving at 90 R. P. M. (R. 249) drawing in two or three feet of line at every revolution; drawn in before any other member of the crew had time to move prior to the instantaneous disaster: What risk could be more incidental to and inherent in the work Anelich did? Truly Anelich was injured by an incidental risk of his employment, and whether the stick was in place or not, the risk remained, the full extent of which he must have appreciated.

Were the stick in place, Anelich must be held to have seen and appreciated the obvious danger. His experience was as great as that of the master and owner of the vessel, and his knowledge and appreciation of the perils was as extensive.

We submit that not merely did the Court err in denying your petitioners the defense of assumption of risk, in any form whatsoever, but that the defense is, as to petitioners' responsibility for the original injury, a complete defense as a matter of law.

II.

THERE WAS NO NEGLIGENCE ON THE PART OF PETITIONERS CONTRIBUTING PROXIMATELY TO THE ORIGINAL INJURY TO ANELICH.

It was the theory of the plaintiff's case that the clutch transmitting power to the winch was so worn out and defective that it would not stay engaged unless the clutch lever was braced or locked in position by a stick, forked at one end and resembling a boot jack, which hung beside the winch on a string (R. 240). The argument proceeded that because the stick was in place the lever could not be thrown in to stop the winch, Anelich, after he became entangled in his line, was pulled into the winch. In support of this theory evidence was introduced as to the existence of the stick and the worn condition of the clutch (R. 106, 130, 337). *There was no evidence that the stick was in place on this occasion.*

Men experienced in marine engineering testified that the clutch required nothing to keep it in mesh when the winch was under a load, such as the purse line, as a result of their examination and actual use of the machine (R. 193, 206, 221). There was further testimony that it was common to use such a stick when a winch was to operate steadily for a

considerable time under a light load, as under those conditions such a clutch tends to shake and gradually slide out of engagement (R. 209, 240, 291, 298). *Further, there was positive testimony by the crew that the stick was not used when the purse line was being hauled in and that it was not in place at the time of this accident* (R. 88, 236, 296).

Peter Mardesich, master of the vessel, testified that when he heard Anelich shout he jumped for the clutch handle to shut off the winch and became entangled in the twisting loops of the line. At that time the stick was not in place. (R. 236.) He stated that he made the stick himself for use in rough weather (R. 240) and that it hung beside the winch all season, was never used when there was a load on the winch, and was not used on the day in question. (R. 241.)

George Brajcich, the forward winchman, doing the same work as Anelich, testified that on the day in question the board was not used; it was used when there was a big swell, but it was not needed when pulling in on the purse line. (R. 296.)

Antone Mardesich said the board was not in place on the day in question. (R. 88.)

The rest of the crew were not concerned with the details of the winch and knew nothing about the stick.

The expert testimony as to the condition of the winch clutch disagreed completely, as so frequently occurs. (R. 106, 130, 337, 193, 206, 221.) The men who used the winch daily, however, testified that it needed nothing to keep it in gear; (R. 88, 197, 198, 236, 296) and they testified positively that nothing was used on the day in question.

This definitely disposes of the contention that the stick was in place; as the trial court said before hearing the defendants' testimony:

"Now I do not recall one word of direct testimony that this stick or brace was in fact and actually in use at the time of the operations being carried on, and at the time of the deceased's injury." (R. 202.)

The clutch did not slip, so the lengthy discussions of the condition of the clutch are irrelevant; had the clutch slipped the winch would have ceased turning and Anelich was injured because it continued to turn.

But, said the State Supreme Court, (R. 20) there is circumstantial evidence that the stick was in place so the lever could not be operated; had it not been in place, the owner of the vessel would have used the lever to stop the winch instead of shouting to the engineer. The reference must be to Antone Mardesich; Peter did try to shut off the winch by means of the clutch lever but was entangled by the loops of the snarled purse line. (R. 236, 250.) No one else was near the winch.

In this connection it should be noted that in respondent's brief in opposition to certiorari, at p. 12, it is said that plaintiff's case rested, at the trial, solely on two charges of negligence, one for failure to furnish proper appliances, and the other for a single act of negligence on the part of the owner in failing personally to stop the winch. In the interests of accuracy, it must be pointed out that the second charge of negligence was not made at the trial; there is no such allegation in the complaint, (R. 1) and the contention was not made at the trial that Antone Mardesich could and should have thrown the lever in, to stop the winch. In fact, respondent's two contentions were (1) that the winch could not be shut off because the stick was in place and (2) that the engineer was not in the engine room and had to go below to disengage the clutch and stop the winch. The latter contention was refuted by every witness who testified on the point, for the entire crew agreed that the engineer was at his post below when the accident occurred and that he stopped the winch immediately. (R. 191, 236, 295, 308, 312, 315, 320.) The contradictory nature of respondent's present position is, of course, obvious; if the stick was in place, as respondent contends then Mr. Mardesich could not have thrown in the lever. This new contention is drawn from the statement of the state court referred to, and was never made on the trial of the case.

What is the value of this "circumstantial evidence" and of this charge of negligence?

The only evidence as to how close Antone Mardesich was to the lever was given by him, to the effect that he was eight or ten feet from where the decedent was standing, with the coils of the forward purse line between them. (R. 86.) Regardless of his position, however, the evidence is conclusive and undisputed that he was at that moment handling the line from the boom which carried the full weight of the net and the heavy leads suspended over the deck, above George Brajcich, who was at the davit, and above the man in the skiff below. To release that line instantly would have endangered their lives; he made his line fast about the winch bitt as soon as he could and by that time the winch was stopped. George Brajcich testified that Antone Mardesich was handling the line from the boom to pull up the net. (R. 299.)

The situation was told by Peter Mardesich as follows:

"Q. Come over and show us the position of those rings and point out what would happen had your father let go of that rope. I want him to illustrate that. You pull it up to where it was at the time this acciden happened as you recall it. (Exhibiting the model.) That was on for the purpose of lifting the rings?

A. Yes.

Q. And what would have happened if that would have dropped?

A. Everything would have gone back in the water.

Q. And this is the leads here?

A. Yes. This would have dropped down on the men working there.

Q. What about the man working on these blocks?

A. It would probably have hit him." (R. 252.)

Antone Mardesich, referring to the model, Plaintiffs' Exhibit C, testified as follows:

"I was here myself on this side of it and I was holding this line up. I was holding this one here to make the operation here; this was on the winch here and then when he yelled, then is when we all yelled to stop the machine and the engineer immediately stopped the machine and when he stopped the machine I put that right on this like this so that I could hold it so this one could come down; that is about a ton or a ton and a half of weight on this here, and won't let this down. This side was released off of here and when he got the foot caught I don't know how his foot got caught in here; I hold this weight right on this like that so it won't come down and fall down, it would hit somebody because the boys was right under here, because that is their job . If I let go of this when he stopped the winch, then that weight pulls back the winch, that power." (R. 81.)

Even if we speculate (there is no evidence) on whether he was close enough to reach the lever, Antone Mardesich could not release the line he was handling without endangering the lives of other members of the crew; to hold him negligent because

he did not drop the line he was holding, with the safety of others depending upon it, is indeed a travesty on justice.

There is no evidence, circumstantial or otherwise, that the stick was in place. There is positive evidence that it was not. The clutch did not slip. The winch was stopped as soon as possible by the engineer who was at his post below. Petitioners submit that there is no evidence of negligence on their part contributing to the injury. "If upon examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed." *Toledo St. L. & W. R. R. Co. v. Allen*, 276 U. S. 155, 159 (1928); *Penna. R. Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 391 (1933).

"By the Federal Employers Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation, by rail; and all state laws on that subject were superseded. Second Employers' Liability Cases, 223 U. S. 1, 55; Seaboard Air Line v. Horton, 233 U. S. 492, 501. The rights and obligations of the plaintiff depend upon that Act and application of principles of common law as interpreted by the Federal Courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This court will examine the record and if it is found, as a

matter of law, that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. * * *

"When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or conributed to cause the death is without any substanial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. Pawling v. U. S., 4 Cr. 219, 221; Patten v. Tex. & Pac. Ry. Co., 179 U. S. 658, 665; Looney v. Metr. & Rf. Co.. 200 U. S. 480, 488; St. L. & Iron M. & N. Ry. Co. v. McWhirter, supra, 252; St. Louis-San Fran. Ry. v. Mills, ante, p. 344." *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 474, 478, 46 S. C. & 564, 70 L. Ed. 104 (1926).

III.

THERE WAS NO NEGLIGENCE IN THE CARE AND TREATMENT AFFORDED THE INJURED MAN BY PETITIONERS.

Respondent's case was based on two causes of action, (1) that the petitioners were liable for the original injury to Anelich and (2) that the petitioners, regardless of liability for the original injury, were responsible for Anelich's death because of negligent treatment and care furnished him after the injury. Specifications of error 1 and 2 deal with the first cause of action; Nos. 3 and 4 with the second cause of action.

The duty which the maritime law places upon the master and owners of a vessel to furnish proper medical attendance and treatment has been stated by this Court in *The Iroquois*, 194 U. S. 240, (*supra*) as follows:

"The duty to provide proper medical attendance and treatment for seamen falling ill or suffering injuries while in the service of a ship has been imposed upon the ship owners of all maritime nations. * * * What is the measure of the master's obligation in cases where a seaman is severely injured while the ship is at sea has been made the subject of discussion in several cases; but each depends so largely upon its own particular facts that the rule laid down in one may afford little or no aid in determining the matter, depending upon a different state of facts. * * * Each case must depend upon its own circumstances, having reference to the seriousness of the injuries, the care that could be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the ship owner, the direction of the wind and the probability of its continuance in the same direction, and the fact of whether a surgeon is likely to be found with competent skill to take charge of the case. * * * With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman of the geography and resources of the country. * * * Seafaring life is dangerous, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the risk is peculiarly applicable to the case of seamen."

The Iroquois is without doubt the leading case upon the question and as is said therein, reference to

other cases is of little value because of the differing facts upon which the decision in each case must depend. All decisions agree, however, that the master is held only to the exercise of reasonable judgment under the circumstances and if that judgment is conscientiously exercised, the master and vessel are not responsible. *The Vanderduyn*, 261 Fed. 887 (C. C. A. 2, 1919); *The Governor*, 230 Fed. 857 (D. C. 1915).

Measured by the standard of care as set forth in these cases, certainly it cannot be said that on the undisputed evidence set forth, the masters and owner of the "Arizona" should be held negligent in their treatment of the wounded man or in the course of conduct followed in securing medical aid for him. It was asserted that the injured man should have been taken to one of several other ports named; it clearly appeared from the evidence that Friday Harbor was the nearest port at which medical attendance could be obtained (R. 330-332) and as was said in *The Iroquois*, the mere fact that plaintiff named several possible ports indicates that there was no one other course which the jury could find as being the only reasonable course under the circumstances. It was also asserted that airplane service should have been called from Seattle, and considerable evidence was allowed as to available airplane service (R. 167

et seq.). Not only did the evidence show, however, that the defendants did not know of the available airplane service and had never heard of it (R. 327), but it also appeared without dispute that the earliest time at which a telephone could be reached was 9:40, more than an hour after the accident (R. 279 281) and that a round trip from Seattle to Friday Harbor could not have been made in less than two hours actual flying time (R. 178). It clearly appears, therefore, that Mr. Anelich received competent medical attention by Dr. Sturdevant at Friday Harbor at 10:30, more than an hour before he could have received such attention had the defendants followed any other course suggested by the respondent here; and that such treatment as Dr. Sturdevant gave him was the standard treatment to be given at the time a doctor first sees such a wound; it is then necessary to allow the patient to rest for a considerable period to recover from shock before any operative measures are taken (R. 22, 166).

The fishermen knew nothing of charter airplane service; they did know of the Coast Guard cutter. The Court below concedes that petitioners "made every effort to contact the Coast Guard (*which was the usual method of getting injured seamen from that locality to the Marine Hospital*) * * *." (R. 24, Italics ours.) That is the case not only in the Puget

Sound district but in every maritime region of the United States. Medical attention and the Coast Guard are the first thoughts in case of injury. Is a jury of landsmen, knowing nothing of the conditions of the sea, to be allowed in every case where the Coast Guard is called, to hold the master guilty of negligence in failing to call an airplane? The lower Courts' holding not only injected an absurd and irrelevant matter into this case, but opens the way to litigation in practically every case in which a seaman is injured upon a fishing or other small vessel when the Coast Guard cutter is called.

Negligence is also charged in the failure of the master of the vessel to treat and cleanse the wound of Anelich on board the vessel. The defendants Mardesich had had no first aid training; (R. 238) both felt the first consideration was to get him to a doctor. (R. 83, 241.) As to possible treatment by use of the first aid kit, Dr. Teufel, who treated Mr. Anelich at the Marine Hospital in Seattle, testified that such dressings were of some, but a very limited, value. (R. 157.) Drs. Teufel and Trask agreed that it would be absolutely inadvisable for an inexperienced person to attempt to cleanse a wound of that extent (R. 161, 269, 271) and to care for such an injury is classed as a major operation. (R. 269.) Dr. Trask testified that it was preferable to allow the clothing

to remain on the wound, rather than to remove it and leave the wound exposed, or to dress it, unless additional infection is guarded against by sterilizing the dressings as well as the hands of the first aid operator. (R. 271, 272.) Dr. Trask stated that the most important thing in such a wound was to stop bleeding, which was done by a tourniquet. (R. 271.)

The doctors all agreed that proper and immediate first aid treatment would lessen to some degree the chances of infection; but as Dr. Trask pointed out, treatment by an inexperienced man might increase infection (R. 271); and Drs. Sturdevant and Trask asserted that in an extensive wound of this sort application of an antiseptic and dressings without cleansing and cutting away dead tissues, would have little effect on germs already in the wound, and would protect against subsequent infection only. (R. 263, 270.)

Had the petitioners tried to clean up the wound, it might well have resulted in their being charged with negligence for doing so and thus increasing infection and shock. The action of the petitioners must be judged by the circumstances in which they found themselves and by the knowledge which they possessed, and they cannot be expected to have the resource, knowledge and training of the masters of larger ves-

sels. It is conceded by the Court below that they did all that they thought of; and as a matter of law petitioners feel that they thought of and did all that men in their position reasonably could be expected to do.

Upon the authority of the decisions of this Court, when the facts do not justify the verdict, the case should be reversed. We respectfully submit that upon the facts of this case, that course is indicated.

IV.

THERE WAS NO NEGLIGENCE OF PETITIONERS WHICH WAS A REASONABLE AND PROXIMATE CAUSE OF SEPTICEMIA RESULTING IN DÉCEDENT'S DEATH.

This phase of the case is entirely removed from the first two specifications of error, and the question of liability for the original injury is not involved.

As just urged, petitioners take the position that there was no actionable breach of any duty owed to Anelich. Even if the State Courts were correct in holding that perhaps these fishermen should have attempted to cleanse and repair the wound, or should have known of and called airplane service, however, there is no evidence that the treatment which Anelich actually received was a proximate cause of the septicemia causing death.

The injury alone could not have resulted in death, and it is charged that the treatment which he received did.

Four doctors gave testimony at the trial. *Each testified that in his judgment the germs which finally resulted in death got into the wound at the moment of the original injury.* (Dr. Teufel, R. 160; Dr. Laige, R. 164; Dr. Sturdevant, R. 262; Dr. Trask, R. 270.) All four agreed that it was impossible to say that any treatment would have prevented the development of septicemia in the wound; and Dr. Sturdevant and Trask stated the percentage of cases developing septicemia from similar wounds was high, (R. 267) perhaps fifty or sixty per cent (R. 269). Dr. Teufel stated that from the symptoms of the case as they developed, he would judge that bacteria got in the wound at the time of the injury, and were carried through the blood stream, showing up as systemic poisoning two or three days later (R. 161), as there was no localized infection. (R. 155.)

If Mr. Anelich had received surgical and hospital treatment *immediately* following the accident, the most likely thing on the medical testimony, is that under these circumstances systemic infection would have developed. Prompt cleansing and repairing of the wound would have been beneficial, to be sure, but

that was not a layman's task; and it cannot be said, with any degree of certainty, that even such treatment would have saved the life of the injured man.

Upon this evidence the jury could do no more than speculate or guess as to whether negligent treatment caused the septicemia and resulted in death, or whether the septicemia developed as an inevitable result of the infection of the wound immediately upon the injury.

In this connection, the case of *Cortes v. Baltimore Insular Line* is in point. A seaman on defendant's ship en route from Florida to New York became ill shortly after leaving Florida. Four days later, having passed several large ships en route, the vessel arrived in port, and twenty-four hours later he was taken to a hospital, dying shortly thereafter of pneumonia. His treatment on board had been careless and neglectful. The lower Federal Courts held that such a cause of action was not within the scope of the Jones Act. On appeal, their holding was reversed, and the case remanded for a new trial. *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 77 L. Ed. 368, 53 S. Ct. 173 (1932).

On the new trial, it developed that he might have had any one of four types of pneumonia, one of which averaged a fatality of from 70% to 90%. The

doctors testified that although proper treatment on board would have increased his chances of recovery, yet, as in the instant case, it was entirely possible that he would have died with the best of care.

The Circuit Court of Appeals of the Second Circuit (66 Fed. (2) 526 (1933), denied recovery, as follows:

"Granting that the jury could have found negligence in treatment, was there evidence from which they could have found that such negligence was the cause of death? We think not * * *

"If he had a disease so fatal that the chance of recovery was only 1 to 3 out of 10 even with the best of treatment, it seems to us pure speculation on the part of the jury to find that the failure to land him at an intermediate port, or to get him to a hospital more promptly after arrival, or the failure to give him more careful treatment aboard ship, was the cause of his death * * *. (The Court pointed out that doctors testified that his chance of recovery would have been increased by reasonable medical treatment on board.) But *that is scarcely equivalent to testimony that with reasonable certainty the defendants' neglect can be said to have caused the seaman's death.* * * *

"Because on this record a verdict for the plaintiff would be purely speculative, we think there was error in submitting the case to the jury. The causal connection between the defendants' breach of duty and the resulting injury or death must not be left to mere conjecture. Thorkeldson v. Nicholson, 154 Minn. 106, 191, N. W. 269, 220; C. M. & St. P. Ry. v. Coogan, 271 U. S. 472, 478, 46 S. C. 564, 70 L. E. 10, 11; Ketterer v. Armour & Co., 247 F. 921, 931, L. R. A. 1918 D. 798 (C. C. A. 2); N. Y. Cent. R. Co. v. Grim-

stad, 264 F. 334 (C. C. A. 2); cf Harris v. Penn. R. Co., 50 Fed. (2) 866 (C. C. A. 4)." (Italics ours.)

The *Coogan* case referred to contains the following:

"By the Federal Employers Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation, by rail; and all state laws on that subject were superseded. Second Employers' Liability Cases, 223 U. S. 1, 55; Seaboard Air Line v. Horton, 233 U. S. 492, 501. The rights and obligations of the plaintiff depend upon that Act and application of principles of common law as interpreted by the Federal Courts. The employer is liable for injury or death resulting in whole or in part from the negligence specified in the Act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This court will examine the record and if it is found, as a matter of law, that the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. * * *

"When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. Pawling v. U. S., 4 Cr. 219, 221; Patton v. Tex. & Pac. Ry. Co., 179 U. S. 658, 665; Looney v. Metr. & Rf. Co., 200 U. S. 480, 488; St. L. & Iron M. & N. Ry. Co. v. McWhirter, supra, 252; St. Louis-San Fran. Ry. v. Milles, ante, p. 344." *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 474, 478, 46 S. C. 564, 70 L. Ed. 104 (1926).

The latest case on this point is *Northwestern Pac. Ry. v. Bobo*, 290 U. S. 499, 78 L. Ed. 462, 54 S. Ct. 263 (1934):

"Our decisions clearly show that '*proof of negligence alone does not entitle the plaintiff to recover* under the Federal Employer's Liability Act. *The negligence complained of must be the cause of the injury.* The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer.' Atchison T. & S. F. R. Co. v. Toops, 281 U. S. 351, 355, 74 L. Ed. 896, 900, 50 S. Ct. 281; Chicago M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564; Atchison T. & S. F. R. Co. v. Saxon, 284 U. S. 458, 76 L. Ed. 397, 52 S. Ct. 229." (Italics ours.)

The only case in any degree supporting the opinion of the Washington Court is the District Court opinion in the *Cortes* case upon its third trial, 6 Fed. Supp. 604, which we submit is contrary to the Circuit Court's decision and to the holdings of this Court. Even that decision, however, recognized that a casual connection must be established and that the wrongful act must have lessened *substantially* the decedent's chances for recovery. It must be remembered that the *Cortes* case offers an example of the most flagrant neglect; the man was seriously ill with pneumonia and medical care was not given him for several days. Application of the doctrine there laid down necessi-

tates no different result here, however, as there is no evidence of neglect of that sort, nor is there any evidence of a *substantial* lessening of his chances for recovery. Blood poisoning caused his death; and blood poisoning more often than not results from such a wound. From his death alone then, no inferences can be drawn. Certainly no doctor testifying in the case was willing to state that his chances of recovery were substantially lessened by the treatment afforded him by the appellants.

The Circuit Court decision, however, is in accord with the decisions of this Court, requiring that a jury's verdict must rest upon facts and not upon speculation, guess or conjecture. In the instant case, as has been pointed out, all medical testimony agreed that in all probability the wound became infected at the time of the original injury; and it was shown that in wounds such as this septicemia develops in more than half of the cases. If such a percentage arises from the average case in which medical attention is not delayed for any length of time, what would be the percentage under circumstances in which dirty clothing is ground into the wound and an enforced delay of two hours exists before medical attention can be reached? Under such circumstances, the jury can do no more than guess when it states that failure to cleanse the wound on board the vessel, or failure to

use an airplane, caused the blood poisoning which resulted in the death of Anelich. Each of the doctors testified that in their opinion the infection got into and was carried through the blood stream a the time of the accident, and even had hospitalization followed *immediately*, it was entirely possible that death would have ensued.

There is absolutely no testimony that negligent treatment, if any, on the part of the defendants can be said *with reasonable certainty* to have been a proximate cause of the decedent's death; on that phase the jury had grounds only for speculation and conjecture, and the court below was in error in holding that a jury question was presented (R. 22).

CONCLUSION

We may summarize the arguments, which we have made at length, somewhat as follows in concluding this brief:

Assumption of risk has always been a defense under both the maritime and the common law. In its maritime application the defense has been modified only so far as the stringent duty of obedience upon the seaman necessitates; and when that duty is no greater or urgent than the duty upon an ordinary shore employee, then between the maritime and the

common law phases of the defense there is no distinction. Anelich was not acting under orders, was under no greater duty of obedience, and was in no different position than any shore employee. The action brought by respondent is based solely upon the common law phase of the defense, however, inasmuch as it is brought under the Federal Employer's Liability Act, codifying and modifying the common law rules, and made applicable to respondent by the Jones Act.

Anelich was injured by risks which were open, obvious and apparent and were, therefore, assumed by him under the maritime law, under the common law, and under the Jones Act. The trial court and the State Supreme Court were in error, therefore, in holding that the defense was not available to your petitioners and by the denial of that defense, a grave injustice has been done; further, petitioners respectfully submit that as a matter of law, Anelich assumed the risk of being injured as he was.

Petitioners further submit that upon the question of the petitioners' negligence contributing to the original injury, a jury could only speculate and guess; and that upon the issue of negligent treatment and care of the injured man there was a complete failure of proof. Further, it is submitted that there is no evidence that the care and treatment furnished

by petitioners was a proximate cause of the septicemia causing Anelich's death Upon the issues of negligence, the lower courts permitted the jury to speculate as to whether the injuries suffered were caused by the negligent acts of the employer, and whether the resulting death was caused by such negligence.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to correct the errors of the Supreme Court of Washington heretofore specified; and that the decision of the Supreme Court of the State of Washington under review should be reversed, in the interests of justice.

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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1935

No. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY CO. OF AMERICA,

Petitioners,

vs.

ANTONIO ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED,

Respondent.

On a Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

WILBUR ZUNDEL,
SAMUEL B. BASSETT,
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Seattle, Washington,

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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1935

No. 667

THE "ARIZONA," ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY CO. OF AMERICA,

Petitioners,

vs.

ANTONIO ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED,

Respondent.

On a Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

BRIEF OF RESPONDENT IN OPPOSITION

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits this brief in opposition to the petition for a writ of certiorari to the Supreme Court of the State of Washington:

I.

Opinion of Court Below

The opinion of the court below is dated September 5th, 1935, and is reported as *Anelich v. The Arizona et al.*, 49 Pac. (2d) 3 (R 18-24).

II.

Jurisdiction

The jurisdiction of this Court is invoked under the Jones Act, 46 U. S. C. A., Sec. 688, and Judicial Code, Sec. 237 (b) as amended Feb. 13, 1925.

III.

Statement of the Case

Most of the facts are fairly and accurately stated by the Supreme Court of Washington in the opinion (R 18 to 24). However, because of several inaccuracies in petitioner's statement of the case, and because of their importance upon the questions involved, we feel that the following facts should be stated for a clearer understanding of the case:

The officers and crew of the Arizona were all Slavonians, except the engineer, who was an American, and all except the engineer spoke and used the Slavonian language in the prosecution of their work. The engineer, of course, neither spoke nor understood that language (R 197, 192, 242, 304, 243).

At several places the petitioners assert that the deceased was "an experienced winchman" and this is repeated several times in the brief in connection with the argument on the question of assumption of risk. This is done, no doubt, to convey the idea that Anelich was a "winch-driver" or "winch-operator," as those terms are generally understood. The truth of the matter is that Anelich had nothing whatsoever to do with the operation of the winch or the management of the clutch and controls. He was nothing more nor less than a mere deck hand, whose only duty was to collect and coil the purse line as it was drawn onto the deck by the winch.

There is not a syllable of evidence in the record that Mr. Anelich knew of the worn condition of the clutch, or that he ever at any time had anything to do with the operation of the winch, or that he appreciated the danger, or that he at any time used the forked stick or lock which held the clutch in mesh.

As stated by the lower courts, for the purpose of preventing this clutch from slipping out or becoming disengaged due to its worn condition, the defendants provided and constructed a lock, consisting of a piece of timber about 14 inches long forked at one end to fit over the handle in the elbow or bend thereof, while the other end was held in place by two cleats securely

fastened to the winch timber; one cleat across the timber and one upright forming a square corner in which the end of the stick next to the bit or timber was placed, thus locking the handle in place and holding the clutch in mesh so that it could not slip out or be thrown out without removing the stick. (Pictures, Exs. A and F). There was evidence from which the jury could find that this stick was in place at the time of the accident. (R 107, 85, 237)

When the stick is in place, in order to stop the winch, without shutting off the engine, it is necessary to push the handle forward (toward the bow) about one inch, the thickness of the cleat, so as to free the stick from the square corner, and permit the removal of the forked end from the elbow of the clutch lever. Then the lever must be pushed aft a short distance to disengage the clutch.

It had the same effect as if one would place a grooved block of wood, tightly, under the clutch pedal of an automobile.

At the trial it was respondent's contention that this clutch lever was a safety appliance to be used in an emergency such as existed when Anelich became tangled in the purse line, and that the forked stick, by means of which it was locked in place, entirely destroyed it as a safety appliance; and there was ample

evidence from which the jury could have found this to be true. (R 342, 347, 93, 96, 99, 104, 107)

At the time the deceased became entangled in the line, the purse lines were still pulling in the nets, and there was considerable weight on the winch and lines. (R 198, 313) The statements on page 18 of petitioner's brief that the weight of the net was off of the line and that the engineer was warned by the shouts of Anelich (R 313, 192, 198) are not correct. There was evidence from which the jury could find that the engineer was on deck (R 68, 69, 74, 50, 300, 121) and that the owner was standing within reach of the clutch lever at the time Anelich became entangled in the line (R 86, 49, 85, 46). The jury was also warranted in believing that the owner, who was within reach of the clutch lever, did not use it because it was locked, as aforesaid, and therefore directed the engineer to go blow and stop the engine.

Anelich became injured in the following manner; a part of the purse line which he was collecting and coiling became entangled, and he jumped to one side to attempt to avoid it, but failed, and then his left leg got caught in the line and it began to pull him toward the niggerhead or drum of the winch (R 312). He exclaimed in the Slavonian language—"Oh, Mother of mine, my leg is caught". (R 243, 308). The engineer,

not understanding the cries of the deceased, did not stop the engine until he was ordered to do so by the owner. However, before the engineer could go below and stop the engine Anelich was drawn into the drum of the winch where his leg was mangled and crushed, and the flesh, muscles and arteries were torn from six to eight inches, exposing the fragmented portions of the fibula and tibia (R 153).

In order to release his leg it was necessary to chop the line from the niggerhead with an axe. Although there was a first aid kit aboard the vessel no effort whatsoever was made to use the same with a view to preventing infection (R 273) nor did the defendants attempt to remove his trousers or underwear. All that they did was to remove his boot, place a rope tourniquet around his leg over his clothing, above his knee, to prevent bleeding; they made no examination of his wound to ascertain the extent of his injury, and gave him no first aid treatment of any kind or character. (R 83, 242). If sterile bandages, which were available, had been used any germs other than those which may have entered the wound at the time of the original injury would have been avoided (R 155, 273).

Anelich was thereafter placed in a small skiff by the defendants and was later transferred to the purse seine fishing vessel, "Congress" (R 82). The defen-

dants sent no one from their vessel to look after or secure medical attention for Anelich. From that time on, he was in the care of persons upon whom there was no legal duty to care for him. (R 242).

Concerning the petitioner's negligence in delaying medical treatment of Anelich the statement of the Supreme Court of the State of Washington should be amplified upon as follows:

The XL II., the second boat to which he was transferred, proceeded to Mitchell Bay, a short distance away, where a fish buyer on board, left the boat, which point was approximately 12 miles by road from Friday Harbor where Dr. Sturdevant and an ambulance were located.

The testimony showed that Dr. Sturdevant could have been in attendance upon the deceased within 20 minutes from the time he received a telephone call from Mitchell Bay (R 266), and there was an ambulance subject to call by phone which could have reached the deceased within 25 to 30 minutes (R 266). If the doctor had been called immediately the deceased's wounds would have been treated and the germs therein, if any, in all probability, would have been rendered innoxious (R 157, 266).

Instead of taking the deceased off of the boat at Mitchell Bay, and securing a doctor at the earliest pos-

sible moment, the XL II continued on to Friday Harbor, a distance of about 15 miles from Mitchell Bay, and arrived there at about 10:30 or 11:00 o'clock in the morning, between 2 and 2½ hours after the injury was inflicted.

Dr. Sturdevant was called to the boat and immediately upon arrival cut the dirty trousers and underwear from the wound and put on a temporary dressing, *even though he knew that the man would be taken to his office within a period of ten minutes.* The deceased was then taken to Dr. Sturdevant's office a short distance away and the wound was thereupon redressed and the deceased was given first aid treatment for the first time.

At the time the fish buyer left the boat at Mitchell Bay he called the Fisherman's Packing Company in Everett and asked them to call the Coast Guard, informing them that there was a man at Friday Harbor with a "broken leg," stating nothing about the fact that the man's leg was practically torn off (R 289). The Coast Guard for some reason did not respond to this call, and Dr. Sturdevant, at about 2 o'clock in the afternoon, called them again to which call they responded and the deceased was picked up by the Coast Guard at Friday Harbor at about 5 P. M. that evening, and was taken to Seattle, Washington, where he

was placed in the Marine Hospital at about 10:50 P. M. and given the usual preliminary treatment including tetanus—antitoxin (R 166). From where the deceased was injured, according to the United States Government Chart, it was 9½ miles to Victoria where there was a first class hospital and a doctor (Ex. 4). Even the slowest boat would have taken only about an hour to get to Victoria. An airplane could have been called and the deceased placed in a hospital in Seattle in two hours (R 178).

On the third day after arriving at the Marine Hospital the deceased developed septicemia (blood poisoning) (R 154-156), from which he died on August 8th, 1933, (R 157).

IV.

Summary of Argument
Assumption of Risk

(1) The Courts below committed no error in holding that Anelich did not assume the risk, as a matter of law,

(a) of defective appliances;

(b) of a single unforseen act of negligence on the part of the owner, in failing to stop the winch. for the reason that these were not ORDINARY risks of the employment, but were EXTRA-ORDINARY risks and are not assumed by a seaman under the gen-

eral Maritime law as amplified by the Jones Act.

(2) The Trial Court did not err in withdrawing from the jury the defense of assumed risk because the petitioner failed to plead and/or prove that Anelich knew of the defective condition of the clutch and appreciated the danger thereof.

(3) Even if the defendants had pleaded and proved that the defective appliance complained of, was known to and fully appreciated by Anelich, under the Maritime law and the Jones Act he would not have assumed the risk thereof.

Evidence of Negligence, As a Matter of Law

1. The lower Court correctly held that there was ample evidence from which the jury could find that the injury and resulting death was due to the defective appliance and acts of negligence of the defendants. The following acts of negligence were clearly proven:

(a) Defective appliances; worn clutch and lock thereon.

(b) Failure of the Owner personally and members of the Crew to disengage the clutch in time to avoid injury.

(c) Failure of the owner and crew to render first aid at the time of accident.

(d) Having an engineer who did not understand the Slavonian language, and delay by the engineer in stopping the engine.

(e) Failure to send any member of the crew with the injured man.

(f) Failure to put into nearest port, and in not adopting fastest available mode of travel to medical aid.

(g) In telling Coast Guard that there was "a man hurt" instead of stating that his leg was practically torn off.

V.

Argument

Throughout petitioners' brief, it is argued that Anelich was not a seaman, in the true sense, under the Jones Act, whereas in fact and in law he was a seaman in every sense.

Warner v. Goltra, 55 Sup Ct. 46;

Domandich v. Doratich, 5 Pac. (2) 310, 165 Wash. 314;

Langness v. Green, 282 U. S. 532, 32 P (2) 565, 32 F (2) 284.

Assumption of Risk, First Branch

The only plea relating to assumption of risks found in the petitioner's answer is that relating to "RISKS NATURALLY INCIDENT TO THE DECEASED'S EMPLOYMENT" (R 10).

The burden was upon the defendants to prove their defense of assumption of risk, and there was no proof whatsoever that Anelich was injured by ORDINARY OR NATURAL RISKS.

Stevens v. O'Brien, 62 F (2) 632 (CCA 5).

There was, therefore, a total failure of proof on this branch of the defense, and no issue on the question to be submitted to the jury.

At the trial the plaintiff's case was rested solely upon two charges of negligence,

(1st) the negligence of the owner of the vessel in furnishing defective appliances, and

(2nd) a single unforseen act of negligence on the part of the owner, personally, in failing to stop the winch and thereby save Anelich from injury.

These two charges of negligence were proved by an abundance of evidence, and both of them constituted EXTRA-ORDINARY risks, which were not assumed by Anelich under the Maritime law as enlarged by the Jones Act.

Throughout their brief the petitioners argue that Anelich was injured by ORDINARY RISKS incidental to his employment, and that the defense of assumed risk was denied to them by the courts below. The petitioners also seem to argue that the courts below erred in not holding, as a matter of law, that Anelich assumed the risks of his employment, regardless of whether these risks were Ordinary risks naturally incidentaly to the employment, or whether they resulted

from the negligence of the owner of the vessel as charged in the complaint, which were EXTRA-ORDINARY risks.

There was ample evidence from which the jury was warranted in believing (1) that the clutch was so worn and defective that it would not stay in mesh without the aid of the stick or lock, and (2) that the owner of the boat was standing within reach of the clutch lever, when Anelich became entangled in the line, and (if the clutch had not been locked) he could easily have disengaged the clutch, but negligently failed to do so.

In the light of this evidence the courts below did not err in holding, as a matter of law, that Anelich did not assume the risk of this negligence.

Chicago R. I. Co. v. Ward, 252 U. S. 19;

Reed v. Director of Railways, 258 U. S. 92;

Ranstrom v. International Stevedoring Co., 277 P. 992, 152 Wash. 332;

Tenneson v. Kadiak Fisheries, 2 P (2) 745, 164 Wash. 380.

The Jones Act expresly provides that a seaman does not assume the risk of a single act of negligence on the part of a fellow servant. He certainly would not assume the risk of the owner's personal negligence.

Warner v. Goltra, 55 Sup. Ct. 46; 46 U. S. C. A., Sec. 688;

Rasmussen v. Twin Harbor Co., 265 P 1085, 147 Wash. 260.

Assumption of Risk, Second Branch

This branch is based upon the fact that the owner negligently furnished defective appliances.

Before this branch of the doctrine could have become an issue in the case, it was incumbent upon the defendants to plead and prove, that the danger of the defective clutch was voluntarily assumed by Anelich, that is to say, that he was aware of and appreciated the danger; this the petitioners failed to do.

Chesapeake & Ohio Ry. v. Winder, 23 F (2) 794;

C. & O. Ry. v. Proffitt, 241 U. S. 462.

> "But if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee without warning to unusual dangers not normally incident to the employment, is in itself an act of negligence."

This statement refers to a shore servant, and as we shall presently show, the rule with reference to seamen is even more liberal; a seaman does not assume the risk of defective appliances, even though he knew of the defect.

There was not a scintilla of evidence that Anelich ever examined this clutch; that he knew its worn con-

dition; that he ever used the stick or lock, or that he appreciated the danger.

With this condition of the record the defendants requested instruction No. 7 (R 12) on the question of assumption of risk.

This instruction was properly refused because there was no evidence from which the jury could have found that Anelich knew of the worn condition of the clutch, and even if he had known, under the maritime law he could not be held to have assumed the risk of a defective appliance, that clearly rendered the vessel unseaworthy.

The instruction would have confused, rather than aided the jury as it would have misled the jury in believing that under the law, as defined in the instruction, a defective appliance and/or an unseaworthy vessel, and the negligence of the owner in failing to shut off the winch, were all ordinary risks incident to the employment, and assumed by Anelich.

Assumption of Risk, as Applied to Seamen, Is not the Same as at Common Law

Petitioners argue that the strict rules of the common law, with reference to assumption of risk, apply to seamen, since the Jones Act.

Before this proposition can be argued, we must as-

sume (without admitting) that there was some evidence from which the jury could have found that Anelich knew and appreciated the danger of the defective appliance.

If this action had been brought, by the seaman, prior to the Jones Act, it could not be denied that the vessel was unseaworthy, for lack of appliances, and the seaman would have been entitled to an indemnity even though he knew of the defect.

The Osceola, 189 U. S. 158

> "That the vessel and her owners are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the *proper appliances* appurtenant to the ship."

By the Jones Act, Congress clearly intended to enlarge the rights of seamen, and their personal represntatives, rather than to restrict them.

The latest expression of this Court is found in *Warner v. Goltra*, 55 Sup. Ct. 46:

> "In the enforcement of the statute a policy of liberal construction announced at the beginning has been steadily maintained. Early in the history of the act, the question came up whether it gave a remedy to stevedores. We decided that it did. 'It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' *Interna-*

tional Stevedoring Co. v. Haverty, 272 U. S. 50, 52, 47 S. Ct. 19, 17 L. Ed. 157. None the less, verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships. 'words,' we said 'are flexible' *****

"In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does effects 'the operation and welfare of the ship when she is upon a voyage' *****

"Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained. Congress knew that men employed upon a ship were without a remedy in damages for negligence beyond their cure and maintenance, *unless the injury was a consequence of the unseaworthiness of the ship or a defect in her equipment* *****.

"The old measure of recovery was the same for all aboard, the highest and the lowest. The new measure was not designed to narrow the protected class while broadening the damages. We stick too closely to the letter if we say that Congress had the will to give damages for wounds or death to the crew at large or their dependents and to leave the master and his dependants out. An ancient evil was to be uprooted, and uprooted together. It was not to be left with fibers still clinging to the soil. ****

"*In respect of dealings of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a 'ward of the admiralty', often ignorant and help-*

less, and so in need of protection against himself as well as others. ****" (Italics ours)

In *Cortes v. Baltimore Insular Line*, 297 U. S. 367, this Court said:

"We are warned, however, that in giving this contention to the statute (holding that failure to give medical attention is a personal injury) we are omitting to give head to its reference to the act regulating the remedies of railroad employees, and are ignoring the standards of duty thus carried over and adopted . . . True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance of cure to sick or disabled employees . . . *We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This Court has said that 'the ancient characterization of seamen as wards of Admiralty is even more accurate now than it was formerly' Robertson v. Baldwin*, 165 U. S. 287. *Another Court has said: "The masters authority is quite despotic and sometimes rougly exercised and the conveniences of a ship out upon the ocean are necessarily limited.' Scarff v. Metcalf*, 107 N. Y. 211, 215, 13 N. E. 796. *Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.* Congress did not mean THAT THE STANDARDS OF LEGAL DUTY MUST BE THE SAME BY LAND AND SEA." (Italics ours)

It is clear from the above statement that this Court has adopted the view that the standards of legal duty as to seamen and land servants are entirely different; that the strict rules of the common law with reference to legal burdens do not apply to seamen.

The Jones Act did not deprive the seamen of any right he had under maritime Law. It gave him greater protection. It is therefore still the Law that a seamen does not assume the risk of defective appliances, although known to him, nor does he assume the risk of a single act of negligence of a fellow servant, or the owner, which negligence he could not have foreseen.

In *Johnson v. Panama Ry Co.*, 264 U. S. 375 this Court affirmed the judgment of the 2nd Circuit where that Court (289 F. 964) held as follows:

> "The maritime law imposed upon the ship owner the risk incident to the use of defective and dangerous APPLIANCES, and we see nothing in the NEW LEGISLATION WHICH CHANGES THE LAW IN THIS REGARD . . . What the law previously was is stated by this Court in *Cricket v. Parry* (CCA) 263 F. 523, in which we held that a ship owner cannot avoid liability for injury to a *seaman* by a defective and dangerous appliance on the ground that the seamen KNEW OF THE DEFECT, when he slipped. We declared . . . if a ship owner supplied defective . . . appliance . . . he did so at his own risk and not at the risk of a seaman."

To the same effect are the following:

In Re Luckenback S. S. Co. 16 Fed. (2) 168;

Cricket SS. Co. v. Parry, 263 F. (CCA 2) 523;

Hansen v. U. S., 12 F. (2) 321;

Grimberg v. Admiral Oriental SS., 300 Fed. 619 (Wash);

Storgard v. France Co., 263 Fed. 545 (CCA);

States SS. Co. v. Berglann, 41 F. (2) 456 (CCA 9th);

The Calvert, 51 F. (2) 494 (CCA 4th);

Henry Gillen's Cons v. Fernald, 294 F. 520 (CCA 2d);

Howarth v. U. S., 24 F. (2) 374 (CCA 2);

Ives v. U. S., 58 F. (2) 201 (CCA 2);

Grace & Co. v. Skaanes, 4 F. (2) 106 (CCA 9th);

Grant v. U. S. Shipping Board, 22 F. (2) 488;

The Waco, 3 F. (2) 476;

Zinnell v. U. S. Shipping Board, 10 F. (2) 47 (CCA).

On Page 31 of petitioner's brief a number of cases are cited in support of the assertion that a majority of the Courts have held that seamen assume the risk of injuries received from defective appliances. The cases cited merely hold that the doctrine of assumption of risk, as to ORDINARY and NATURAL risks, applies to seaman; but with reference to EXTRA-ORDINARY risks some of them hold that seamen do not assume

these risks even though known, and others either hold, or state the rule, that seamen do not assume the risks of defective appliances unless known and appreciated. We invite the court to read these cases for they are the very basis of petitioner's contentions in this case.

Petitioners admit that when a seaman is under any sort of orders he does not assume the risk of defective appliances. We submit that it would be almost impossible for this court or any court to state what is, and what is not, an order; it might well be argued that Anelich was under orders, for the master and the owner were within a few feet of him directing his work. (R. 197)

Evidence of Negligence

The 2nd, 3rd and 4th reasons for the allowance of the writ on Page 5 of petitioner's brief all involve questions of fact, which were submitted to the jury on substantial evidence and resolved in favor of the respondent.

In *Gunning v. Cooley*, 281 U. S. 90, where there was a question as to whether or not the plaintiff had proved negligence of a doctor in treating the plaintiff's ear, this court said:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a preemptory instrution, the Court assumes that the evidence for the opposing

party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them. (cases cited) Where uncertainty as to the existence of negligence arises from a conflict in the testimony . . . the question is not one of law but of fact to be settled by the jury."

The arguments advanced by the petitioners are conclusively answered by the Supreme Court of Washington in the opinion (R. 22 to 24) with an appropriate citation of authority.

See also *Cortes v. Baltimore Insular Line*, 287 U. S. 367. .

VI.
Conclusion

In conclusion we respectfully submit that *certiorari* should be denied in this case for the following reasons:

1. That the questions sought to be raised by the petition herein involve nothing but questions of fact.

2. That under the evidence the jury was warranted in finding that the injury proximately resulted from the personal negligence of the owner in failing to disengage the clutch when he saw that Anelich had become entangled in the line. If this is true, Anelich could not have assumed the risk.

3. Even under the rule of assumed risk as applicable to shore workers, there was a total failure of proof

of knowledge of the defective winch.

4. That the rulings of the Courts below are in harmony with the uniform holdings of the Admiralty Courts.

5. That under the uniform holdings of the several circuits, which have passed upon the question of law sought to be raised by the petitioners, a seaman does not assume the risk of an unseaworthy vessel, or of defective appliances, even though the defects and dangers are known to him. This is precisely the holding of the Supreme Court of the State of Washington.

We respectfully submit that the only questions in this case are questions of fact, and that no reason for the issuance of the Writ has been disclosed by the petition herein, and that the same should be denied.

Respectfully submitted,

WILBUR ZUNDEL, and
SAMUEL B. BASSETT,
Counsel for Respondent.

January 23, 1936.

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On a Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

RESPONDENT'S BRIEF

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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1935

No. 667

THE "ARIZONA", ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY CO. OF AMERICA.

Petitioners,

vs.

ANTONIO ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED,

Respondent.

On a Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

RESPONDENT'S BRIEF

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits the following brief upon the merits:

STATEMENT OF THE CASE

Aside from the detailed description given by Petitioner, most of the facts are fairly and accurately stated by the Supreme Court of Washington in the opinion (R 18 to 24). However, because of several inaccuracies in petitioner's statement of the case, and

because of their importance upon the questions involved, we feel that the following facts should be stated for a clearer understanding of the case:

The officers and crew of the Arizona were all Slavonians, except the engineer, who was an American, and all except the engineer spoke and used the Slavonian language in the prosecution of their work. The engineer, of course, neither spoke nor understood that language (R 197, 192, 242, 304, 243).

At several places the petitioners assert that the deceased was "an experiencéd winchman" and this is repeated several times in the brief in connection with the argument on the question of assumption of risk. This is done, no doubt, to convey the idea that Anelich was a "winch-driver" or "winch-operator", as those terms are generally understood. The truth of the matter is that Anelich had nothing whatsoever to do with the operation of the winch or the management of the clutch and controls. He was nothing more or less than a mere deck hand, whose only duty was to collect and coil the purse line as it was drawn onto the deck by the winch.

There is not a syllable of evidence in the record that Mr. Anelich knew of the worn condition of the clutch, or that he ever at any time had anything to do with the operation of the winch, or that he appreciated the danger, or that he at any time used the forked stick or

lock which held the clutch in mesh.

As stated by the lower courts, for the purpose of preventing this clutch from slipping out or becoming disengaged due to its worn condition, the defendants provided and constructed a lock, consisting of a piece of timber about 14 inches long forked at one end to fit over the handle in the elbow or bend thereof, while the other end was held in place by two cleats securely fastened to the winch timber; one cleat across the timber and one upright forming a square corner in which the end of the stick next to the bit or timber was placed, thus locking the handle in place and holding the clutch enmesh so that it could not slip out or be thrown out without removing the stick. (Pictures, Exs. A and F). Three expert witnesses testified that the clutch was so worn it would not stay enmesh without a stick or lock. (R. 107, 130, 85, 337). One of petitioner's witnesses testified it would slip without the stick (R. 298). There was therefore ample evidence from which the jury could find that this stick was in place at the time of the accident.

When the stick is in place, in order to stop the winch, without shutting off the engine, it is necessary to push the handle forward (toward the bow) about one inch, the thickness of the cleat, so as to free the stick from the square corner, and permit the removal of the fork-

ed end from the elbow of the clutch lever. Then the lever must be pushed aft a short distance to disengage the clutch.

It had the same effect as if one would place a grooved block of wood tightly, under the clutch pedal of an automobile.

At the trial it was respondent's contention that this clutch lever was a safety appliance to be used in an emergency such as existed when Anelich became tangled in the purse line, and that the forked stick, by means of which it was locked in place, entirely destroyed it as a safety appliance; and there was ample evidence from which the jury could have found this to be true. (R. 342, 347, 93, 96, 99, 104, 107).

At the time the deceased became entangled in the line, the purse lines were still pulling in the nets, and there was considerable weight on the winch and lines. (R. 189, 198, 313). The statements on pages 8 and 9 of petitioner's brief that the weight of the net was off of the line and that the engineer was warned by the shouts of Anelich (R. 313, 192, 198) are not correct. There was evidence from which the jury could find that the engineer was on deck (R. 68, 69, 74, 50, 300, 121, 339) and that the owner was standing within reach of the clutch lever at the time Anelich became entangled in the line (R. 86, 49, 85, 46). The jury

was also warranted in believing that the owner, who was within reach of the clutch lever, did not use it because it was locked, as aforesaid, and therefore directed the engineer to go below and stop the engine.

Anelich became injured in the following manner: a part of the purse line which he was collecting and coiling became entangled, and he jumped to one side to attempt to avoid it, but failed, and then his left leg got caught in the line, and it began to pull him toward the niggerhead or drum of the winch (R. 312). He exclaimed in the Slavonian language—"Oh, Mother of mine, my leg is caught" (R. 243, 308). The engineer not understanding the cries of the deceased, did not stop the engine until he was ordered to do so by the owner. However, before the engineer could go below and stop the engine Anelich was drawn into the drum of the winch where his leg was mangled and crushed, and the flesh, muscles and arteries were torn from six to eight inches, exposing the fragmented portions of the fibula and tibia (R. 153).

In order to release his leg it was necessary to chop the line from the niggerhead with an axe. Although there was a first aid kit aboard the vessel no effort whatsoever was made to use the same with a view to preventing infection (R. 273) nor did the defendants attempt to remove his trousers or underwear. All that

they did was to remove his boot, place a rope tourniquet around his leg over his clothing, above his knee, to prevent bleeding; they made no examination of his wound to ascertain the extent of his injury, and gave him no first aid treatment of any kind or character. (R. 83, 242). If sterile bandages and iodine, which were available, had been used any germs other than those which may have entered the wound at the time of the original injury would have been avoided (R. 155, 273), and those which entered the wound at the time may have been rendered innoxious.

Anelich was thereafter placed in a small skiff by the defendants and was later transferred to the purse seine fishing vessel, "Congress" (R. 82). The defendants sent no one from their vessel to look after or secure medical attention for Anelich. From that time on, he was in the care of persons upon whom there was no legal duty, to care for him. (R. 242).

Concerning the petitioner's negligence in delaying medical treatment of Anelich the petitioner's statement of the case and the statement of the Supreme Court of the State of Washington should be amplified upon as follows:

The XL II., the second boat to which he was transferred, proceeded to Mitchel Bay, a short distance away, where a fish buyer on board, left the boat, which

point was approximately 12 miles by road from Friday Harbor where Dr. Sturdevant and an ambulance were located.

The testimony showed that Dr. Sturdevant could have been in attendance upon the deceased within 20 minutes from the time he received a telephone call from Mitchel Bay (R. 266), and there was an ambulance subject to call by phone which could have reached the deceased within 25 to 30 minutes (R. 266). If the doctor had been called immediately the deceased's wounds would have been treated and the germs therein, *if any, in all probability, would* have been rendered innoxious within 45 minutes. (R. 157, 266)

Instead of taking the deceased off of the boat at Mitchell Bay, and securing a doctor at the earliest possible moment, the XL II continued on to Friday Harbor, a distance of about 15 miles from Mitchell Bay, and arrived there at about 10:30 or 11:00 o'clock in the morning, between 2 and 2½ hours after the injury was inflicted.

Dr. Sturdevant was called to the boat and immediately upon arrival cut the dirty trousers and underwear from the wound and put on a temporary dressing, *even though he knew that the man would be taken to his office within a period of ten minutes.* The deceased was then taken to Dr. Sturdevant's office a short

distance away and the wound was thereupon redressed and the deceased was given first aid treatment for the first time.

At the time the fish buyer left the boat at Mitchell Bay instead of calling the Coast Guard direct, he called the Fisherman's Packing Company in Everett and asked them to call the Coast Guard, informing them that there was a man at Friday Harbor with a "broken leg", stating nothing about the fact that the man's leg was practically torn off (R. 289).

Sometime later when Mr. Suljin of the Packing Co. at Everett talked with some one in Port Townsend, he merely said to tell the Coast Guard that "there is a man hurt" (R. 289) without stating that his leg was practically torn off. He then went to lunch without knowing when, if ever, the Coast Guard secured this call (R. 289). The record is not clear whether this call ever reached the Captain of the Coast Guard boat. The Coast Guard for some reason did not respond to this call, and Dr. Sturdevant, at about 2 o'clock in the afternoon, called them again to which call they responded and the deceased was picked up by the Coast Guard at Friday Harbor at about 5 P. M. that evening, and was taken to Seattle, Washington, where he was placed in the Marine Hospital at about 10:50

P. M. and given the usual preliminary treatment, including tetanus-antitoxin (R. 166). From where the deceased was injured, according to the United States Government Chart, it was 9½ miles to Victoria where there was a first class hospital and a doctor (Ex. 4). Even the slowest boat would have taken only about an hour to get to Victoria. An airplane could have been called and the deceased placed in a hospital in Seattle in about two hours (R. 178).

On the third day after arriving at the Marine Hospital the deceased developed septicemia (blood poisoning) (R. 154-156), from which he died on August 8th, 1933, (R. 157).

ARGUMENT

The petitioner's brief assigns four specifications of error, but it is apparent that there are only two major questions involved in this case:

1. Does a seaman, as a matter of law, in an action under the Jones Act, assume the risk of an unseaworthy vessel and defective appliances

   (a) When he continued to use the appliance with knowledge of the defect,

   (b) When, as in the case at bar, there is no evidence of the fact that he knew of the defect, or appreciated the danger, and the only plea of assumption of risk, upon

which there was no proof, was as to ordinary risks.

Or stated in another manner, with particular reference to the facts in this case, is the question of assumption of risk involved in a case where the only allegations and proof of negligence are those which, as a matter of law, constitute EXTRA ORDINARY RISKS (i.e., defective appliances and single unforseen act of negligence by the owner), and the only plea of assumption of risk, upon which there is no proof, is that the deceased was injured by "risks naturally incident to the decedent's employment".

2. Was there sufficient evidence from which the jury could find that the injury and resulting death was due to the negligence of the defendants?

I.

ASSUMPTION OF RISK BY SEAMEN

A. WHEN CONTINUING TO WORK WITH KNOWLEDGE

Under the facts in this case the question is squarely presented to the court as to whether or not the rights of seamen are to be measured by the equitable principles of the Maritime Law or by the strict rules of the common law.

The plaintiff in this case brought an action under

the Jones Act in the State Court before a Jury and petitioners contend that by doing so the seaman is to be treated the same as a railway employee and that his rights are to be determined under the decisions and principles laid down by the courts in construing the Federal Employer's Liability Act, 45 U. S. C. A 51-59, as applied to shore servants.

From the inception of the Admiralty Courts, seamen, due to the nature of their employment, and their inability to take care of themselves, have been considered Wards of the Admiralty. The decisions of this and other courts have fostered and liberally construed all statutes enacted for the protection of seamen.

It is the respondent's contention that seamen have never assumed the risk of an unseaworthy ship or defective appliances, even though they shipped, or continued to work, knowing of the defect. That it is a non-deligable duty of the ship owner to see that the ship is seaworthy and that the appliances appurtenant thereto are proper and safe.

One of the leading cases in this country is The Osceola, handed down by this court in 1902. Petitioners contend that this court did not pass upon nor consider the question of assumption of risk in that case. That this court did not intend to state the law in such broad

terms, and for that reason the defense of assumption of risk was impliedly considered as still being available to the owner of a vessel, even where the boat was unseaworthy or there were defective appliances.

THE OSCEOLA, 189 U. S. 158.

This was an action for damages by a seaman employed on a ship plying the Great Lakes. The plaintiff was injured by the negligence of the master in ordering the gangplank to be lowered into the wind just before the vessel docked. The wind caught the gangplank and blew it against the libellant and injured him. The court held that the ship was seaworthy, and that the injury was due to the negligence of the master, and that under the Maritime law, the libellant could not recover for the negligence of a fellow servant. It is not clear to what extent the question of assumption of risk was argued to the court, but we do know that it was at least in the court's mind, for in the portion of the opinion devoted to the briefs and arguments of counsel we find on page 162 the following:

> "Sound reason and natural justice requires only that the owner of the vessel shall be bound to use reasonable care to furnish a seaworthy vessel, sufficient and safe appliances, and sufficient and competent seamen and officers, and that the law of ASSUMPTION OF RISK SHOULD BE APPLIED TO THE SEAMEN".

The court then went into a detailed discussion of the history of various decisions and statutes throughout the world and the whole tenor of the decision is to the effect that owners of boats have always been liable to an indemnity where the boat is unseaworthy or there are defective appliances, regardless of any question of assumption of risk.

Throughout the decision we find such expressions as the following: (p. 173)

> "In The Ben Flint, 1 Abb. U. S. 126; S. C. 1 Biss 562, the claim to be cured at the expense of the ship is held to be applicable to seamen employed on the lakes and navigable rivers within the United States. See also *Brown v. Overton*, 1 Sprague, 462; *Croucher v. Oakman*, 3 Allen 185; *Brown v. The Brandish Johnson*, 1 Woods, 301.
>
> In The Edith Gooden 23 F. 43, the vessel was held liable in rem for personal injuries received from the neglect of the owner to furnish appliances adequat to the place and occasion where used. In other words FOR UNSEAWORTHINESS.
>
> This is readily distinguishable from the previous case of The City of Alexandira, 17 F. 390 and is in line with English and American authorities holding owners to be responsible to the seamen for the unseaworthiness of the ship and her APPLIANCES."

On page 170 the court said:

"In all of them (codes and decisions) there is a provision against liability in case of injuries re-

ceived by the sailor's wilfull misconduct."

This Court also made the following statement:

> "It will be observed in these cases that a departure has been made from the continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from UNSEAWORTHINESS. This departure originated in England .... and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own."

On page 175 this court laid down certain rules of law which, it is our contention have, for years, had the force and effect of statutes when the rights of seamen are involved:

> "Upon a full review, however, of English and American authorities upon these questions, we think, the law may be considered as settled upon the following propositions:
>
> 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
>
> 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the *unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.*

In the third and fourth propositions the court held that the fellow servant doctrine applied in Admiralty and that the seaman could not recover for the negligence of the master or any member of the crew, which is just another way of stating that the seaman assumed the risk of the negligence of a fellow servant.

With such a well considered opinion, it is idle to contend that this court impliedly held that a seaman assumes such EXTRA ORDINARY risks as unseaworthiness and defective appliances. If such an important exception was intended this court would have expressly so stated.

Shortly after the decision in the Osceola the harshness of the fellow servant doctrine, as applied to seamen, was recognized by Congress and there was enacted Section 20 of Act to Promote the Welfare of American Seamen, approved March 4th, 1915, 38 Stat. 1164, which provided that "seamen having command shall not be held to be fellow-servants with those under their authority".

In *Chelentis v. Luckenbach SS Co.*, 247 U. S. 372 (1917) this court held that the act of 1915, which was aimed at the fellow servant doctrine, did not increase the damages beyond maintenance and cure.

The court, however, in handing down the decision in

the Chelentis case construed the effect of the holding in the Osceola case in the following language:

> "The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of The Osceola; and although, because of these peculiarities, such contracts are almost invariably litigated in Admiralty courts, still the contract must be the same in *every court*, maritime or common law. The only difference between a proceeding in one court or the other would be that the remedy would be regulated by the *lex fori* . . . . *So a seaman* bringing suit in a common law court for personal injuries could recover, even if guilty of contributory negligence, although a shore servant suing in the same court could not; and a seaman suing in a common law court for personal injuries could recover (except in the case of UNSEAWORTHINESS of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity."

Subsequent to the decision of this court in the Chelentis case and before the enactment of the Jones Act the C. C. A. of the Second Circuit had the question of assumption of risk, as applied to seaman, before it in the much cited case of

Cricket S. S. Co. v. Parry, 263 F (CCA2) 523, (1920), plaintiff was a seaman, winch driver. He went to work knowing that the wire rope on the winch was too heavy, and had steel core when it should have

been smaller with a hemp core. While he was operating the winch a loop of the wire rope fell on the drum of the starboard winch, as it was coming light from the hold, caught him around the body, jerked the lever out of his hand and threw him over the drum. His arm was so mangled that it had to be amputated.

The plaintiff sued contending that he was furnished with improper appliance with which to work. The defendant answered contending that he assumed the risk. The court gave judgment for the plaintiff and said:

> "The defendant contends that the plaintiff cannot recover because he shippepd with knowledge of the condition complained of, and because so far as the wire rope is concerned, proper rope could not be obtained. Two decisions of this court are cited in support of the first proposition. ****We do not think them applicable because the plaintiffs were shore servants, in the first a LONG-SHOREMAN AND IN THE SECOND A RAILROAD HAND. We are considering the rights of seamen, who have constituted from early times a peculiar class. The unusual protection extended to them is reflected in the familiar saying that they are wards of the admiralty. As to the second proposition, shipowners cannot justify furnishing them with defective and dangerous appliances on the ground that they knew it. ****The remarks by Mr. J. Brown in the Iroquois, 194 U. S. 240, ***are not to be understood as holding that defective and dangerous appliances are among the *ordinary* risks of the calling: ***The claim he was considering was *****for a sailor who had fallen from a loft in heavy weather.

> The injury was an accident pure and simple, necessarily attending the seamen's occupation. So far as the second proposition we think that vessel OWNERS WHO SAIL THEIR SHIPS WITH IMPROPER APPLIANCES WHEN THEY CANNOT GET PROPER ONES, DO SO AT THEIR OWN RISK, AND NOT AT THAT OF THE SEAMEN."

Note that this case goes so far as to hold that the seaman does not assume the risk even where the owner CANNOT get proper appliances.

And on the same day that court decided:

Storgard v. France & C Co., 263 F 545 (CCA2) 1920. In this case a seaman caught his fingers in an iron band that was attached to one of the sails, and as a result of an iron bolt being allowed to become worn he was injured. In deciding for the plaintiff the court said:

> "If the bolt was worn and defective, and the shipowners knew or ought to have known the fact, it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen. * * * The seamen were bound to use the equipment and appliances which the owners furnished, and they were on their part bound to furnish and maintain equipment and appliances for the seamen to use, at least free from defects known or which ought to be known. *The common law rules do not apply to this relation of master and seaman. It is intimate and peculiar, and differs from that between shore mas-*

ter and servants. * * * Employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of employers of shore servants."

Congress, with the rulings of these courts in the above cases fresh in its mind, in a determined attempt to protect seamen, and rid the law applicable to them of the only harsh rule then in existence (i.e. the fellow servant doctrine) enacted Section 33 of the Merchant Marine Act of 1920 (46 U.S.C.A. Sec. 688) also known as the Jones Act.

If prior to the Jones Act the rule of assumption of risk had applied to seamen injured by reason of the unseaworthiness of the ship, or defective appliances, certainly this Honorable count would have made reference to the matter at the time the above rule was proclaimed, and had there been any doubt in the mind of Congress as to the law, that there could be no assumption of risk, where there was unseaworthiness or improper appliances, an appropriate exception as to assumption of risk would have been inserted, similar to that applicable to Railway employees, where it was specifically provided, that there shall be no assumption of risk where there was a violation of a statute providing for a safety appliance. At the time the Jones Act was passed, the duty of a ship owner to furnish a seaworthy vessel and proper appliances, was as absolute

and as binding as if the same had been prescribed by statute, and it was not intended by the Jones Act to relieve the ship owner of this absolute duty to the seamen or to permit the owner to defend on the ground of assumption of risk, where his negligence resulted in unseaworthiness or defective or improper appliances.

This court through Mr. Justice Cordozo in the late case of *Warner v. Goltra*, 293, U.S. 155 clearly sets forth the reasons for the enactment of the Jones Act.

> "The purpose of the lawmakers, clear enough, we believe, upon the surface of the act, takes on an added clearness when the act is viewed in the setting of its history. Section 33 of the Merchant Marine Act of 1920 (46 U.S.C.A. Sec. 688) is derived from section 20 of the Act of 1915, 38 Stat. 1185 (46 U.S.C.A. Sec. 688 note). The parent section was aimed at the fellow-servant rule in its application to torts upon navigable waters. * * * The decision of this Court in the Chelentis Case gave warning that the change, if any, thus effected, did not avail to increase the damages beyond the cost of cure and maintenance. Thus warned, the lawmakers amended section 20 of the Act of 1915 by substituting section 33 of the Act of 1920. We cannot believe that in this process of amendment the word 'seamen' lost the broad meaning that it had in the law to be amended, and was narrowed by the exclusion of a particular species. * * *"

It is therefore clear what the law was prior to the enactment of the Jones Act, and what evils the act intended to correct. It is further clear that prior to the

Jones Act a seaman did not assume the risk of defective appliances or an unseaworthy ship even though he knew of the defect.

Every rule of reason and construction leads to the inevitable conclusion that the enactment of this act enlarged rather than restricted the rights of seamen.

The following cases are cited by respondent in support of her contention that under the Jones Act a seaman cannot assume and does not assume the risk due to unseaworthiness of the vessel, defective appliances or negligence of the owner or a fellow servant. Before the Jones Act the law disregarded negligence and awarded an indemnity; since the Jones Act the right to damages rests upon negligence.

The leading case under this Act is *Johnson vs. Panama Ry. Co.*, 264 U. S. 375.

The plaintiff was a seaman on the steamship "Alliance." The injury occurred while the vessel was afloat in the water of the Guanquil River in Equador, South America. The plaintiff was injured as a result of a defective ladder while he was climbing from the deck to the bridge, the most open and obvious place on a ship. The defense of assumption of risk was raised.

In this case the constitutionality of the Jones Act was involved and this Court was called upon to deter-

mine how much of the Emp. Liab. Act was contained in the Jones Act and at page 391 the court said:

> "The reference as is readily understood is to the Employers Liability Act of 1908, C. 149, 35 Stat. 65, and its amendments."

This Court approved the rule on the question of assumption of risk as laid down by the C.C.A. in this case, 289 Fed. 964, where the lower court in stating the rule at page 978, said:

> "Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability thereof. * * * It should not be overlooked, that, where the use of the terms risk and acceptance of the risk are involved, the true question is whether, in incurring the particular risk in question, the plaintiff accepted the risk in the sense that by continuing at his work he agreed to relieve the defendant from the possible results. The plaintiff, consequently, not only must be shown to have KNOWN of the risk, but by implication from his conduct must be found to have voluntarily assumed it. * * * A risk must be voluntarily assumed to relieve the master of the liability."

On page 969 the Court said:

> "The Jones Act, however, *extends*, the seaman's right to recover damages for personal injuries, and applies in such cases the remedy given under the statutes of the U. S. to railway employees."

Again on page 980:

> "There is, however, no necessity for basing this decision on the doctrine that the plaintiff cannot be regarded as having voluntarily assumed the risk. The Maritime law imposed upon the ship owner the risk incident to the use of defective and dangerous APPLIANCES, and we see nothing IN THE NEW LEGISLATION WHICH CHANGES THE LAW IN THIS REGARD. The Fed. Emp. Liab. Act did not create the law. It simply recognizes it as it already existed, and restricted it in the classes of cases embraced in Sec. 4 of the act. What the law previously was is stated by this court in *Cricket SS. Co. vs. Parry* (C.C.A.) 263, F. 523, in which we held that a ship owner cannot avoid liability for injury to a seaman by a defective and dangerous appliance on the ground that the seaman knew of the defect, when he shipped. We declared in that case that, if a ship owner supplied a defective and dangerous appliance when a proper one could not be obtained, he did so at his own risk, and not at the risk of a seaman. There are cases in the other circuits holding the same doctrine (cases cited). The law as laid down in the above case is amply sufficient to justify the plaintiff's position that he did not assume the risk arising from the insufficient and dangerous apparatus which the ship owner furnished at its and not the plaintiff's risk."

The Circuit Court of Appeals again referring to the Judiciary Act of 1789, said:

> "The right of the common law courts was recognized and it was provided that the Federal District Court should have exclusive right of Admiralty and Maritime Jurisdiction saving to suitors in all cases the right of Common Law remedy

where the Common Law is competent to give it. The maritime law afforded two remedies. One was a proceeding in *rem*, and the other was a proceeding in *personam*. Where the proceeding was in *rem*, the jurisdiction of admiralty was exclusive; where it was in *personam* the courts of Common Law had a concurrent jurisdiction. And where a party came into the Common Law Court with a proceeding in *personam*, which he might have brought in the admiralty court, the cause was disposed of according to the procedure which governed that class of courts, and was tried WITH A JURY. It certainly cannot now be questioned that the act under which the plaintiff proceeded was in any respect invalid in providing that a seaman who suffers a personal injury in the course of his employment may not sue at law and have a right to a trial by jury. * * * The Jones Act extends the seaman's right to recover damages for personal injuries and applies in such cases the remedy given under the statute of U. S. to Ry. Employees."

And at page 974, the court quoted the language of this Court in the Ocela Case, 189 U. S. 158, setting forth the admiralty rules governing seamen.

The *Panama Ry. v. Johnson* case is cited and quoted from on page 23 of petitioner's brief but they do not mention the very strong language just quoted supporting our contention, nor do they state that this Court approved the language of this case, and stated that the law was correctly laid down by the lower court.

Supporting our contention that the Jones Act merely added to the rights of seamen, we find the following

within the petitioner's quotation:

> "The election is between alternatives accorded by MARITIME LAW AS MODIFIED and not between that law and some NON-MARITIME SYSTEM."

Shortly after the decision in the Panama case this court again further extended the rule in

International Stevedoring Co. v. Haverty 272 U. S. 50 (1926)

In holding that a stevedore was a seaman within the meaning of the act this court said:

> "It is true that for most purposes, as the word is commonly used, stevedores are not seamen. But words are flexible . . . The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business . . . In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of the opinion that a wider scope should be given to the words of the act, . . ."

In the latest case dealing with the Jones Act this court again enlarged the rights of seamen.

Warner v. Goltra, 293 U. S. 155.

The master of a tug boat met his death on the waters of the Ohio River, through the negligence of a pilot employed to navigate the tug. The personal represen-

tative brought an action under the Jones Act and the lower Court sustained a demurrer to the complaint on the ground that a "master" is not a seaman within the meaning of the Act. In construing the act this Court, through Justice Cardozo said:

> "In the enforcement of the statute a policy of liberal construction announced at the beginning has been steadily maintained. Early in the history of the act, the question came up whether it gave a remedy to stevedores. We decided that it did. 'It is true that for most purposes, as the word is commonly used. stevedores are not 'seamen'. *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 52, 47 S. Ct. 19, 71 L. Ed. 157. None the less, verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships. 'words', we said 'are flexible'. " * * *
>
> "In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage' ". * * *
>
> "Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained. Congress knew that men employed upon a ship were without a remedy in damages for negligence beyond their cure and maintenance, *unless the injury was a consequence of the unseaworthiness of the ship or a defect in her equipment*" * * *
>
> "The old measure of recovery was the same for all aboard, the highest and the lowest. The new measure was not designed to narrow the protected

class while broadening the damages. We stick too closely to the letter if we say that Congress had the will to give damages for wounds or death to the crew at large or their dependents and to leave the master and his dependents out. An ancient evil was to be uprooted, and uprooted altogether. It was not to be left with fibers still clinging to the soil. * * *

"In respect of dealings of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a 'ward of the admiralty', often ignorant and helpless, and so in need of protection *against himself* as well as others. * * *

This court in the very late case of *Cortes v. Baltimore Insular Line*, 297 U. S. 367, clearly adopted the rule that the standards of legal duty as to seamen and land servants are entirely different, when it said:

"We are warned, however, that in giving this contention to the statute (holding that failure to give medical attention is a personal injury) we are omitting to give head to its reference to the act regulating the remedies of railroad employees, and are ignoring the standards of duty thus carried over and adopted . . . True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance of cure to sick or disabled employees . . . *We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This Court has said that 'the ancient char-*

acterization of seamen as wards of Admiralty is even 'more accurate now than it was formerly Robertson v. Baldwin, 165 U. S. 287. *...Another Court has said: "The masters authority is quite despotic and sometimes roughly exercised and the conveniences of a ship out upon the ocean are necessarily limited.' Scarff v. Metcalf,* 107 N. Y. 211, 215, 13 N. E. 796. *Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.* Congress did not mean THAT THE STANDARDS OF LEGAL DUTY MUST BE THE SAME BY LAND AND SEA." (Italics ours)

Practically every point and contention raised by the petitioner in this case is answered, in accordance with our contentions, in a case just decided by the CCA of the 4th Circuit.

The New Berne, 80 F. (2) 244 (CCA 4th, Nov. 1935)

The deceased was a seaman on a regular run between Norfolk and Baltimore. He spent considerable time on the shore, making three trips a week. It appeared that for some time there was an auxiliary engine on the ship that was in such condition, due to the lack of a battery, that it had to be started by an open fire blow torch. When the main engine was stopped this auxiliary engine was used. On the night in question the main engine was stopped and the deceased stated that he was going to start the other engine. The

deceased had used the torch on numerous occasions. There was stored in the engine room certain gasoline tanks that were not properly vented so that the fumes from them could rise to the outside. Within a few minutes after the deceased went down to start the auxiliary engine, a fire broke out in the hold, and the deceased was burned to death. There was no direct evidence as to how the fire started, it was all circumstantial evidence to the effect that in attempting to use the open fire torch the fumes from the gasoline and oil in the engine room caught fire. The administratrix brought an action under the Jones Act and recovered a judgment. On appeal the following questions were raised:

1. Was the vessel unseaworthy.
2. Did the deceased assume the risk of the defective appliance, when he knew of the same and was fully aware of the condition.
3. That the doctrine of assumption of risk should apply the same as though the accident had happened on land.
4. That the deceased was not a seaman in the true sense of the act.

In holding that the deceased was a seaman and did not assume the risk the court said:

> "And we think that the judge below correctly held that decedent did not assume the risk arising from

the unseaworthy condition of the vessel; for the rule is well settled that a seaman does not assume the risk arising from the unseaworthy condition of the vessel on which he serves even if such condition be known to him when he embarks. *Scheffler v. Moran Towing & Transportation Co.* (C.C.A. 2d) 68 F. (2d) 11; *Ives v. United States* (C.C.A. 2d) 58 F. (2d) 201, 202; *Howarth v. United States Shipping Board Corporation* (C.C.A. 2d) 24 F. (2d) 374; *Panama R. Co. v. Johnson* (C.C.A. 2) 298 F. 964, 978-980, affirmed 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; *Cricket S.S. Co. v. Parry* (C.C.A. 2d) 263 F. 523, 525.

Then follows the much quoted portion of the Cricket opinion to the effect that seamen are wards of Admiralty and owners who sail their ships with improper appliances do so at their own risk, and not at the risk of the seamen.

This case so clearly and forcefully answers practically all of petitioner's contentions that we will quote at length from the opinion:

"It is argued that where suit is brought under the Merchant Marine Act 1920, Sec. 33, 46 U.S.C.A. Sec. 688, to recover damages on account of the injury or death of a seaman, the defense of assumption of risk should be applied just as though the injury had occurred on land. This is not correct. It is true that the Merchant Marine Act provides that in actions on account of the injury or death of a seaman the "statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.' But those statutes do not make

assumption of risk a defense. It was a defense at common law. They merely regulate the liability arising out of negligence, provide that contributory negligence shall diminish damages instead of barring recovery, and abolish the common law assumption of risk as applied to actions arising out of violations of the Safety Appliance Acts (45 U. S. C. A. Sec. 1 *et seq.*) 45 U.S.C.A. Sections 51, 53, 54. Assumption of risk is a defense, therefore, in an action for injury on land brought under the federal employers liability act, and not involving the safety appliance acts, because the defense existed at common law and is not affected by the statute. In an action under the Merchant Marine Act, assumption of risk is not a defense as applied to the unseaworthiness of the vessel, because it was not a defense prior to the enactment of the statute, and the statute has not created the defense. As said by Judge Rogers in *Panama R. Co. v. Johnson, supra*, 289 F. 964, at page 980:
'The maritime law imposed upon the shipowner the risk incident to the use of defective and dangerous appliances, and we see nothing in the new legislation which changes the law in this regard. The Federal Employers' Liability Act (45 U.S.C. A. Sections 51-59) did not create the law. It simply recognizes it as it already existed and restricted it in the classes of cases embraced in Section 4 of the act (45 U.S.C.A. Sec. 54)."

It is argued that as defendant was on a regular run in the Chesapeake Bay between Norfolk and Baltimore, making three trips a week and spending a large part of the time on shore, he does not come within the spirit of the rule which exempts seamen from assuming the risk of defective appliances and unseaworthy condition of vessels on which they serve. The contention is that his position was similar to that of a harbor worker or

longshoreman, and that he should be held to the same rule regarding assumption of risk as if he were working on shore, reliance being placed upon the decision in *Scheffer v. Moran Towing & Transportation Co., supra*, 68 F. (2d) 11. We are not impressed with this contention. Decedent was unquestionably a seaman, not a harbor worker or longshoreman, and his rights were governed by Maritime Law. Under the law, risk arising from unseaworthy condition of the vessel or defective appliances was not assumed; and we have no disposition even if we had the power, to import into the Maritime Law the common-law doctrine with respect to assuming the risk of the master's negligence. That doctrine had its origin under conditions very different from those which prevail today, and should be limited rather than extended. To say that the servant assumes the risk of the master's negligent failure to provide him safe and suitable appliances with which to work, because he does not exercise the theoretical freedom of choice to leave the employment, is little short of mockery of the economic necessity which requires him to work with any appliances which may be provided. *Instead of adopting the common law rule in Admiralty, the rule of Admiralty should be adopted by the common law, so that one whose negligent failure to provide safe appliances has resulted in injury to an employee should not be allowed to escape liability on the plea that the employee voluntarily assumed the risk of such negligence.*"

On the question of assumption of risk this case is squarely in point with the case at bar, and the reasoning of the court is so sound and commensurate with the spirit of the Jones Act that this court should be constrained to adopt the views therein stated.

On page 30 of petitioner's brief they quote at length from the case of *Southern Ry. Co. v. Hermans*, 44 F. (2) 366, decided by the 4th Circuit, in 1930. The New Berne case does not even mention the Hermans case for the reason that the risk of the tugs coming in contact with each other was held to be an ORDINARY RISK, known to the deck hand. This case further refused to follow the case of *Scheffler v. Moran Towing Company* 68 F. (2) 11, relied upon by petitioners.

The following well considered cases also hold strictly to the rule:

Grace & Co. vs. Skaanes, 4 Fed. (2d) 106 (C.C.A.) 1925.

This was a suit in Admiralty by a stevedore. The plaintiff was a winch tender on board the ship Santa Paula, which was discharging cargo in the Los Angeles Harbor. The winch was lifting heavy boilers from the hold when the wire cable running to the winch broke and injured him. The defendant pleaded assumption of risk. On appeal the C.C.A. for the 9th Circuit said:

> "We think there is no merit in this appeal. * * * We do not think we would be justified in interfering with those conclusions of fact by the trial court, nor in sustaining either of the contentions on behalf of the appellant that the appellee should be held to have assumed the risk resulting in his injury, * * *"

This man was not technically a seaman, and the court without further comment refused to hold that he assumed the risk of a defective applance.

In *Grimberg vs. Admiral Oriental S.S.*, 300 Fed. 619 (Wash.) the plaintiff, a seaman, was injured by tripping over an iron bar holding down a tarpaulin upon a hatch cover, which bar was negligently not fastened in place, in that one end of it extended beyond the hatch coaming, and projected over the passage across which plaintiff was in the act of going. The defendant pleaded assumption of risk and Judge Cushman in speaking of the effect of the Emp. Liab. Act as affecting the rule of assumption of risk said:

> "It therefore follows that an injured seaman must be held to have assumed the risk of injury from any and all those dangers ordinarily and naturally incident to the service in which he engages; but it cannot be that Congress intended to make applicable to seamen the entire doctrine of assumption of risk as the same has been developed under the law of railway carriers. This necessarily results from the difference in the terms of the two employments. The servant or employee on shore is free to quit at will his employments, if there appear to him dangers in it; this the seaman cannot do."

And after enumerating the obligations of a seaman to the ship and the penalties imposed upon him for disobedience said:

"The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work, not made reasonably safe, although with knowledge of the danger he continues in the employment." Citing the Crickett case.

In *States S.S. Co. vs. Berglann*, 41 F. (2) 456 (C. C.A. 9th), Berglann, a seaman, was injured while going from his quarters to the galley to get a bucket of water. Seas were running and while returning another servant was just ahead of him when Berglann saw a heavy sea about to break and yelled to the men ahead of him to hurry. The man ahead opened the steel door and escaped the sea. Berglann was too late but caught the inner hand hold of the door which was jammed against its casing by the force of the sea, thereby injuring Berglann's arm. Three grounds of negligence were charged. (1st) Failure to have a man rope or life line strung along the well deck. (2d) Negligent delay on the part of the seaman preceding plaintiff, blocking plaintiff's escape. (3rd) Permitting a skuttle door on top of the poop deck, which would afford plaintiff an alternative and safer way of entering the crews' quarters, to become out of repair, so that it had to be lashed shut, and could not be used to avoid danger. The plaintiff commenced an action at law under the Jones Act, and the defendant pleaded assumption of risk.

In passing upon this question the Court said:

"The chief question on this appeal is as to the assumption of risk of injury from these various conditions by his crossing the well deck as he did. Appellant contends that the risk assumed by plaintiff are to be measured by the rule recently declared by the Supreme Court in the *Del. L. & W. Ry. Co. vs. Koske*, 279 U. S. 7, as to railroad employees, namely, that the employee assumes 'when obvious or fully known and appreciated, * * * the extraordinary risk and those due to negligence of his employer and fellow employees'. However, that portion of Sec. 33 of the Merchant Marine Act * * * does not require the definition of assumption of risk by a seaman in the same terms used with reference to railway employees. The doctrine of assumption of risk has long been applied to the cases of seamen, its application has been made with reference to the peculiar nature of the seamen's employment and his subjection to orders and inability to abandon his employment during a voyage. There is nothing in the action above quoted, intimating that any change is to be made in this regard. *Panama Ry. Co. vs. Johnson*, 289 F. 964. In performing such tasks a seaman assumes all of the ordinary risk of his employment, but, because he cannot quit the ship nor control the actions or orders of the ship's officers, he does not assume the risk of negligent acts of those in charge of the ship whereby his place of work as a seaman is made unsafe, nor does he assume the risk of failure of those in charge of the ship to take such precautions as the perils of the sea may render necessary and reasonable. *The evidence as to the conditions actually existing was in conflict as to all three of the acts of negligence charged, and the court properly submitted all of them to the jury.* Finding no error. * * * The judgment is affirmed."

In *Henry Gillen's Sons Lighterage v. Fernald*, 294 F. 520 (C.C.A.), where a seaman was injured by a hole in the deck which he had known of for a week, and while the ship was at the dock, the court said:

> "The owner cannot delegate his duty to others. The principle is thus stated by Judge Ward in *Storgard vs. France* * * *; * * * 'The common law rules do not apply to this relation of master and seaman. It is intimate and peculiar, and differs from that between shore master and servants,—employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of employers of shore servants' * * * When plaintiff came aboard the lighter the day of the accident, it was the duty of the owner to see to it that the lighter was fit for the work intended, and, where such a defect has existed for a week or thereabout, it cannot be said that a boat is thus fit."

In The Calvert, 51 F. (2d) 494 (C.C.A. 4th) the court held that a master of the barge did not assume the risk of an unseaworthy condition arising by reason of a leak in the hull, even though he, knowing better than anyone else of the defect, continued to work.

In *Howarth v. U. S.* 24 F. (2d) 374 (C.C.A. 2) a messboy was injured due to the fact that a door on the passage did not have a latch so that it would stay open while he was carrying trays through it; the door slammed and caught his finger. It was held that the ship was unseaworthy, and that he did not assume the risk of a defective appliance.

Ives vs. U. S. 58 F. (2d) 201 (C.C.A. 2) 1932. A seaman was injured due to a ventilator being stuck. He and another seaman attempted to open it, with a pipe and the pipe slipped off and struck the plaintiff in the eye. It was held that the ship was unseaworthy and that the plaintiff did not assume the risk of defective appliances, even though he knew it.

Another well considered case holding that a seaman does not assume the risk of defective appliances is the *Waco*, 3 F. (2d) 476, where the court said:

> "A vessel must be in all respects *seaworthy* which is the EQUIVALENT TO THE COMMON LAW DUTY OF PROVIDING A SERVANT WITH A SAFE PLACE TO WORK. The Osceola, . . . "

See also *Dopico v. N. Y. Marine Co.*, 217 N. Y. S. 295 where the defense of assumption of risk was stricken on motion.

Petitioners have cited exerpts from a number of cases which have dealt with assumption of risk. In a very few have they given the facts, and upon a careful examination, in practically all of them, the court will state the general rule laid down in the Osceola case and then distinguish the facts in the case and really hold that what the seaman assumed was an ORDINARY RISK.

In the case at bar the evidence showed that the stick or lock which held the clutch in place was old and painted the same color as the rest of the boat; the evidence further showed that the worn condition of the clutch was something of long standing and that it would take several years of wear to place it in the condition it was at the time of the accident. Anelich had never been on this boat before, so it cannot be contended that he worked over a long period of time with the condition existing.

We have been unable to find a well considered case since the Jones Act, where the facts are at all comparable to the case at bar, in which the court held that the seaman assumed the risk of defective appliances.

The rule that a seaman does not assume the risk of defective appliances and an unseaworthy vessel is based upon sound judgment and experience. The rule should apply with double force at this time for it is very easy to make any and all necessary repaires to boats in this mechanical age. Fifty years ago a boat owner may have had difficulty securing certain appliances, but today such a mechanical device as a clutch can be shipped even across the country in a few days. With machine shops in even small towns, almost any mechanical device can be repaired or replaced in a few hours. It would not have taken over a day at a cost

of probably $40.00 to replace the clutch on the Arizona, and yet the owner, knowing of this condition, allowed the ship to go out to sea with one of the most important mechanical devices on a fishing boat in a defective condition. It is unreasonable to state that any seaman should assume the risk of any defective appliance, for he cannot drop his tools and walk off as shore servants can, it is easy for owners of boats to contend that a man should not work if he sees a defective appliance, but it is an economic necessity, that workmen hold their jobs, and especially so during the season of 1933 when Anelich was injured. There was then and is now a shortage of jobs, and it is our belief that there will always be a surplus of laboring people. The evidence showed that Anelich and his family, part of the time, was on the relief rolls. If this court adopts a rule that seamen assume the risk of such defects, it will enable ship owners to sail their ships with impunity; there will always be another man to take the injured man's place. As stated by the court in The New Berne case, it would be well for the common law courts to adopt the Admiralty rule, instead of the Admiralty courts adopting the common law rule.

We submit that the weight of authority in this country supports the doctrine that a seaman does not assume EXTRA ORDINARY RISKS, even though he

continued to work knowing of the defect.

On pages 41 and 42 of petitioner's brief they contend that the C. C. A. for New York, or the 2nd Circuit, has recently retracted from the strict rule laid down in numerous prior cases. They cite and rely upon:

Scheffler v. Moran Towing Co. 68 F. (2d) 11: Libellant was a cook on one of the respondent's harbor tugs. He had been engaged not only as cook but as deck hand if needed. On the morning in question the deck hand on the tug did not show up and libellant took his place, to handle the lines. After he had a number of lines fast, in going forward to make another line fast he carelessly got his leg in a bite of the port towing strap, which as the scow drifted back with the tide, caught and injured him. The trial court found the tug unseaworthy because it was shorthanded, and allowed the plaintiff to recover. The court makes the statement quoted on page 68 of appellant's brief, which should have ended with a comma, and then continues:

> "And assuming for the time being that the owner is liable even though nobody could possibly anticipate that the defect would cause the injury. This we can do because the libellant assumed the risk of the tug's short handedness. It is indeed true in general THAT A SEAMAN AT SEA DOES NOT ASSUME THE RISK OF ANY UNSEAWORTHINESS THOUGH IT BE KNOWN TO HIM WHEN HE EMBARKS," citing *Cricket vs. Parry, Panama vs. John,* Uinnell *vs. Shipping Board.*

Judge Monton, concurring, said:

> "Assuming the tug was unseaworthy because of the absence of the deck hand, this was not the proximate cause of the injury to the appellee. It was his own negligence which brought about his injury. I think the rule of assumption of risk has no application to the circumstances here, but I concur in the result."

In this case Judge Hand did not intend to reserve the question of whether or not a seaman assumed the risk of an unseaworthy condition or defective appliances, and this is clearly indicated by the language used and the cases cited in support thereof.

Petitioners further cite, in support of their contention that the 2nd Circuit has changed the rule:

Johnson v. U. S., 74 F. (2d) 703, 1935

Here a seaman elected to take a dangerous route over the well deck when he could have gone through the tunnel to the mess hall. The court held that the washing overboard by a wave was due to his negligence and not that of the master or owners. The court said:

> "A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation."

Both Judge Hand, who wrote the Scheffler opinion, and Judge Swan concurred in the opinion in the Johnson case and the opinion does not even cite *Cricket v. Parry* and numerous other cases from the 2nd Circuit holding that a seaman does not assume the risk of defective appliances. Certainly these judges did not attempt to overrule, without mentioning, numerous of their prior cases. We submit that the 2nd Circuit has not, in any sense retracted from its prior position.

Petitioners admit that a seaman does not assume the risk of defective appliances if he is under an order of any kind. It would be practically impossible for any court to accurately define what are and what are not orders, or what this or that individual would consider as an order. The master of a ship has absolute control and is often despotic; his orders are law on the ship. From a practical standpoint every seaman is under orders when he is doing the work which he was ordered to do. If the rule is laid down that a seaman assumes the risk of using defective appliances, except where he is under orders, it will leave open to ship owners an avenue of escape from liability that will be inequitable and unfair, and never intended by Congress when the Jones Act was enacted.

If such a rule is invoked it will undoubtedly be the duty of the seaman, or his heirs, to prove that he was

injured while acting under orders, before he can escape the general rule of assumption of risk. In a large majority of the cases the widows of seamen will be unable to produce any testimony to this effect. It might well be argued however, under the proof in this case that Anelich was under orders, for the master and owner were within a few feet of him directing his work. (R. 197) Who can say that Anelich did not understand that he was under orders.

B. WHEN THERE IS NO EVIDENCE OF KNOWLEDGE OF DEFECTS, AND THE ONLY PLEA IS ASSUMPTION OF ORDINARY RISKS.

The record can be searched with minute detail but there is not one scintilla of evidence that Mario Anelich knew of the worn condition of the clutch or that he ever at any time had anything to do with the operation of the winch, or that he appreciated the danger, or that he at any time ever used the stick or lock, which held the clutch in mesh.

This lever was on the opposite side of the winch from where Mr. Anelich was working and there is no evidence in the record that he ever used the lever or that he had seen it used by others. All of the evidence is to the effect that this winch was started and stopped by the engineer below.

It is respondent's contention that the clutch in question was installed, as, or was, capable of being used, in contemplation of emergency when the safety of the vessel or the crew required immediate stopping of the winch. That the possibility of its use for this purpose was knowingly and deliberately destroyed or removed by the owner of the vessel, when, because of the worn condition of the clutch, the master provided the stick which was in use at the time of the injury to Anelich.

Even if we assume (without admitting) that a seaman assumes those risks which he knew and appreciated, still under the facts in this case there can be no assumption of risk.

There would then be two branches of assumption of risk applicable here:

1st. That an employee assumes those risks that are naturally incident to the employment.

2nd. That even though the employer has been negligent in furnishing certain appliances still the employee assumes the risk of such negligence if he continues to work, being aware of and appreciating the danger.

The only plea relating to assumption of risks found in the petitioner's answer is that relating to "RISKS NATURALLY INCIDENT TO THE DECEASED'S EMPLOYMENT." (R. 10)

The burden was upon the defendants to prove their

defense of assumption of risk, and there was no proof whatsoever that Anelich was injured by ORDINARY OR NATURAL RISKS. There was a total failure of proof on this branch of the defense.

At the trial the plaintiff's case, with reference to the original injury, was rested upon two charges of negligence.

1st. The negligence of the owner of the vessel in furnishing defective appliances, (i.e. worn clutch).

2nd. A single unforeseen act of negligence on the part of the owner, personally, in failing to stop the winch and thereby save Anelich from injury.

The principal question at the trial was whether or not this clutch was so worn that it had to be and was locked in. Respondent introduced no evidence whatsoever that any of the ordinary risks mentioned by the petitioner caused the injury.

Petitioner is now asking this court to hold, as a matter of law, that the use of the worn clutch was assumed by Anelich, for the reason that it was an ordinary risk.

On the second branch of assumption of risk, if the petitioners intended to rely upon it, it was incumbent upon them to *plead* and *prove*, that the danger of the defective clutch, if any, was voluntarily assumed by

Anelich, by reason of the fact that he was aware of and appreciated the danger. Even conceding the fact that such testimony would have been admissible, there was no evidence whatsoever to substantiate this defense.

Petitioners in a futile attempt to find such evidence, on page 51 of their brief, state that Anelich was working near the stick and he must have used it and must have known of the defective condition of the clutch. In other words, petitioner is asking this court to hold as a matter of law that Anelich knew of the condition of the clutch and that he used the stick. The burden was upon the petitioners to *prove* these facts. There were eight or nine members of the crew who had been on the boat with Anelich during the season, and each of these men testified at the trial. It is practically certain that if Anelich knew about the worn condition of this clutch, or had used the stick, these witnesses would have so testified.

In *Chesapeake & O. Ry. v. Winder*, 23 F. (2d) 794 (C.C.A. 4) a railway employee's case, the court said:

> "As to the assumption of risk . . . the burden of proving that plaintiff had assumed the risk is upon the defendant, and in order to justify a directed verdict for the defendant on that ground the evidence tending to show such assumption must be clear and uncontradicted."

In another railway case this court in *C. & O. Ry. v. Proffitt*, 241 U. S. 462, said:

> "But if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence . . . . . *The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment*, but which result from the employer's negligence."

In *O'Brien vs. Lucken[illegible]cn SS. Co.*, 293 Fed. 170 at 179, the deceased was a CARPENTER working on a ship at the dock. The Court said:

> "In the instant case the deceased was exposed to a danger not normally incident to his employment. The danger was occasioned by the negligence of his employer in allowing the timbers to be placed upon the hatch, and in not having the hatch properly secured. The decedent had a right to assume that his employer had seen to it that the hatch was properly secured, and was reasonably safe. He is not to be treated as assuming the risk of its insecurity, until HE BECOMES AWARE OF IT AND IT HAS NOT BEEN SATISFACTORILY SHOWN THAT HE WAS AWARE THAT IT WAS INSECURE. He was under no obligation to ascertain whether it had been secured and could be stepped on in safety."

In the case at bar there was no duty upon the deceased to examine the clutch and there is no evidence that he was aware of the defective condition of it, and therefore he could not assume the risk.

With this condition of the record the petitioners requested instruction No. 7 (R. 12) on the question of assumption of risk.

This instruction was properly refused because there was no evidence from which the jury could have found that Anelich knew of the worn condition of the clutch, and even if he had known, under the Maritime law he could not be held to have assumed the risk of a defective appliance, that clearly rendered the vessel unseaworthy.

This instruction would have confused, rather than aided the jury as it would have misled the jury into believing that under the law, as defined in the instruction, a defective appliance and/or an unseaworthy vessel, and the negligence of the owner in failing to shut off the winch, were all ordinary risks incident to the employment, and assumed by Anelich. The instruction failed to define an ordinary risk and the difference between that and an extra-ordinary risk.

Petitioners also contend that the seaman assumed the risk of delayed medical treatment. There was no pleading or offered instruction on the question of assumption of risk of delayed medical attention, and all of the evidence offered by both sides was submitted to the jury.

Under the practice in Washington it was the duty of the petitioner to submit proper instructions, under the law and facts, and it is not the duty of the court to segragate the correct from the incorrect. If an instruction is partly correct and partly incorrect, the court can, without error, refuse the whole instruction.

In *Fehler v. Montesano*, 188 p. 5, 110 Wash. 143, the Supreme Court of Washington, citing a long line of cases, laid down the rule:

> "By several announcements of this court, the law is fixed that it is not error to refuse to instruct the jury as requested when the instruction is partially erroneous; that is, there is no obligation upon the court to segregate the correct and incorrect portions of a requested instruction and then submit the correct portion to the jury."

See also *Hansen v. Sandvik*, 128 Wash. 60 to the same effect.

In discussing the assumption of risk of causes of the original injury, the petitioners contend that Anelich was merely a shore worker, and could get away from the ship in a short time, but when they come to the assumption of risk of delayed medical attention they contend that Anelich was a seaman in the strictest sense, and that he assumed the risk of the owners taking whatever time was necessary to get him to a doctor and hospital.

It is clear from the record in this case that even though this court holds that a seaman assumes the risk of defective appliances, when known to him, that under the facts in the case at bar the judgment of the lower court should be affirmed.

It is true that the Supreme Court of Washington stated that the trial court declined to submit the defense of assumption of risk to the jury, but what the court really held and meant to state was that under the law and facts in this case the defense of assumption of risk was not an issue to be submitted to the jury.

II.

SUFFICIENCY OF THE EVIDENCE

A. Of Negligence Causing Original Injury

Assignments of error 2, 3, and 4 all present the single question of whether or not there was sufficient evidence from which the jury could find that the injury and resulting death was due to the negligence of the defendants.

In considering these assignments the court must keep in mind the fact that the respondent is a widow of the deceased seaman; that she was unable to secure even one witness, from the members of the crew, who would testify in her behalf. She was compelled to prove her

entire case from the testimony of hostile, adverse and interested witnesses.

Petitioners are, in effect, challenging the sufficiency of the evidence.

In *Gunning v. Cooley*, 281 U. S. 90, where there was a question as to whether or not the plaintiff had proven negligence of a doctor in treating the plaintiff's ear, this court said:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a preemptory instruction, the Court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them. (cases cited) Where uncertainty as to the existence of negligence arises from a conflict in the testimony . . . the question is not one of law but of fact to be settled by the jury."

There was ample evidence from which the jury was warranted in believing (1) that the clutch was so worn and defective that it would not stay in mesh without the aid of the stick or lock, and (2) that the owner of the boat was standing within reach of the clutch lever, when Anelich became entangled in the line, and (if the clutch had not been locked) he could easily have disengaged the clutch, but negligently failed to do so.

With reference to the condition of the clutch Mr. Hurd testified: (R. 107)

"Q. In your opinion, Mr. Hurd, would that clutch stay enmeshed with a three ton load on it if this stick was not used, or some other method of holding it?

A. Well, it might if it was standing still, but you couldn't start it; it wouldn't turn only one or two turns before it would work out of place.

Mr. Lincoln testified: (R. 130)

"Q. In your opinion, Mr. Lincoln, would that clutch without some assistance from some other source stay enmeshed when the load is applied?

A. I don't think—it may on occasions, but it would be too great a risk.

Q. And why wouldn't it stay in, if it would not?

A. Because of it's worn it will climb out."

Mr. Bolstad testified: (R. 337)

"Q. Now, in your operation as a fisherman have you ever seen a block used as you found on the 'Arizona' yesterday?

A. Well, very seldom. I have seen a little wire on it just temporary to hold it until they could get into port and get the jaw clutch fixed. A thing like this is nothing but just a trap, that's all. * * *

A. Well, for one thing, this drive clutch here, the jaws are chipped off. It tapers so when she is driving it has a tendency to spring apart. The drive side of this jaw is chipped off. On one side it is a quarter of an inch and tapers

down to three-quarters instead of a full inch and a half, and on the other side it is three-quarters instead of a full inch and a half."

See also Mr. Brajich's testimony to the same effect. (R. 299)

The testimony to the effect that Mr. Antone Mardesich, the owner of the boat was within a few feet of the clutch lever is as follows: (R. 86)

"Q. Let's have your mark on this model here just where you were standing, on which side of this, at the time Mr. Anelich was hurt.

A. I was standing, let's see,—I was standing on this side here. (indicating)

A. Well, mark an "M",

A. Approximately in there. (indicating)

Q. On the starboard side just forward of the winch and near the after starboard side of the house.

Q. How much distance is there between where you were standing and where Mr. Anelich was standing.

A. It's about eight or ten feet, . . ."

See also pages 46 and 49 of the record, which show the same position.

An examination of the exhibits (Model of Boat) will show that the winch handle was within a few feet of the spot where the owner of the boat says he was standing at the time Anelich exclaimed that he was caught.

If the stick or lock was not in place he was clearly negligent in not disengaging it, however, the jury had a right to believe that the clutch was so worn that it would not stay in place and that it was locked in at the time Anelich was hurt. As stated by the Supreme Court of Washington, "we think, however, that there was sufficient circumstantial evidence for the jury to find that it was (being used)."

The engineer testified as follows: (R. 191)

"Q. Tell us what you actually did.

A. When they hollered I reached over and pulled the main clutch out to stop the winches. That is the main clutch. (R. 192)

Q. And do you say he was suffering a great deal?

A. Yes, sir, he was. You see, I don't understand their language at all, and they were talking in their own native tongue, and I figured the best thing to do was to get out of there, because they could understand each other and I would be in the road, and I stayed away."

There was considerable direct testimony from which the jury could have believed that the engineer was actually on deck at the time Anelich hollered, and thus the winch could not be stopped until he was able to go down to the engine room. (R. 68, 69, 74, 121, 50, 300, 339)

The following acts of negligence were clearly proven:

(a) Defective appliances; worn clutch and lock thereon.

(b) Failure of the owner personally and members of the crew to disengage the clutch in time to avoid injury.

(c) Failure of the owner and crew to render first aid at the time of accident.

(d) Having an engineer who did not understand the Slavonian language, and delay by the engineer in stopping the engine.

(e) Failure to send any member of the crew with the injured man.

(f) Failure to put into nearest port, and in not adopting fastest available mode of travel to medical aid.

(g) In telling Coast Guard that there was 'a man hurt' instead of stating that his leg was practically torn off."

In the light of this evidence the courts below did not err in holding, as a matter of law, that Anelich did not assume the risk,

(a) of defective appliances, rendering the boat unseaworthy;

(b) of a single unforseen act of negligence on the part of the owner, in failing to stop the winch.

Hansen v. U. S. 12 F. (2d) 321 (So. D. Ga. 1926)

In this case the plaintiff was a seaman on board the ship Coldwater in the harbor at Charleston, S. C. The injury to the plaintiff was caused by his being caught in a cable, which was wound around a winch and cut

off his leg. The plaintiff commenced an action in Admiralty under the Jones Act alleging that the winch was dangerous, defective, unseaworthy and unsafe; that the defendant was negligent in standing by the winch and seeing the plaintiff injured when two steps could have been taken by another seaman and the winch shut off, and in waiting while other seamen climbed down the engine room to cut off the steam at the boiler.

In the opinion the court quotes in full the rules laid down in the Osceola, 189 U. S. 158, which applied before the Jones Act. The Court then said:

> "The Circuit Court of Appeals of the Second Circuit in the case of *Allianca, Panama R. Co. vs. Johnson*, 298 Fed. 964, and the SUPREME COURT OF THE U. S. in the same case, 264 U. S. 375, held that the said Merchant Marine Act of 1920 made applicable to seamen, whether the suit be brought at common law or in Admiralty, the provisions of the Fed. Emp. Liab. Act and its amendments. The Emp. Liab. Act. provides: (act quoted)
>
> The doctrine of the assumption of risk has not been altered and while a recovery cannot be defeated by contributory negligence, the doctrine of comparative negligence with resulting diminution in the amount of recovery is applicable.
>
> This case must therefore be determined under the provisions of the Merchant Marine Act.
>
> A review of the evidence is unnecessary. A decree * * * in favor of libellant of $5,000."

In that the facts in the above case are almost identical with those in the case at bar, it holds the owner guilty of negligence in not shutting off the winch.

See also:

Chicago R. I. Co. v. Ward, 252 U. S. 19;

Reed v. Director of Railways, 258 U. S. 92;

Ranstrom v. International Stevedoring Co., 277 p. 922, 152 Wash. 332;.

Tenneson v. Kadiak Fisheries, 2 P. (2d) 745, 164 164 Wash. 380.

The Jones Act expressly provides that a seaman does not assume the risk of a single act of negligence on the part of a fellow servant. He certainly would not assume the risk of the owner's personal negligence.

Warner v. Goltra, 293 U. S. 155;

46 U. S. C. A. Sec. 688;

Rasmussen v. Twin Harbor Co., 265 P. 1085, 147 Wash. 260.

Clearly there was ample evidence from which the jury could find that the original injury was due to the negligence of the defendants and as stated by this court in *Gunning v. Cooley, supra,*

> "Where uncertainty as to the existence of negligence arises from a conflict in the testimony, the question is *not one of law* but of fact to be settled by the jury."

B. AS TO PETITIONERS' NEGLIGENCE IN RENDERING MEDICAL CARE AND ATTENTION.

Petitioners admit that on the question of whether or not prompt and adequate medical attention has been rendered, each case must stand upon its own facts. The *Iroquois*, 194 U. S. 240. This being true, if there is any evidence of negligence whatsoever, it becomes a question for the jury.

The Supreme Court of Washington so clearly and forcefully answered these contentions in the last three pages of the opinion that we again desire to call the court's attention to this portion of the opinion (R. 22, 23, 24)

The evidence is not in dispute and clearly shows that by the exercise of ordinary and reasonable care and diligence, the defendants could have procured, at little or no expense, the services of Dr. Sturdevant within less than an hour from the time Mr. Anelich was injured. They could have been in Victoria, 9½ miles away, within an hour, where there was a first class hospital and doctor.

The character of his wound was of such a nature that the ordinary layman, had they taken the trouble to pull up his trousers and look at it, would have been

impressed with the imperative need of immediate medical attention, and the record shows, from the tesimony of the defendant's own witnesses, that within less than fifteen minutes they transferred the deceased to another vessel and thereafter gave him no care, attention or concern whatsoever.

As we view petitioner's contention this is admitted; and they now contend that under the circumstances they performed their full legal duty under the facts in this case.

Mr. Makovich was at the telephone a very few minutes after the accident but he did not call the doctor and he did not call the Coast Guard. He did, however, communicate with the Fishermen's Packing Company in Everett with the request that they get in touch with the Coast Guard and send them to Friday Harbor to pick up a man with a "broken leg." The record is not clear as to whether the captain of the Coast Guard boat ever got the message sent by the Fisherman's Packing Company. They did not even use their first aid kit and their excuse for not using it is based upon the fact that this was a broken leg and that they did not think a first aid kit would cure a broken leg. The master testified:

"Q. Now did you use the first aid kit on Mr. Anelich?

A. No.

Q. Why didn't you?

A. I didn't think a first aid kit would cure a broken leg. (R. 241)

Q. And what did you do for him if anything?

A. We didn't do anything. We transferred him from the Arizona to the Congress right away." (R. 242)

Antone Mardesich, owner of the vessel abandoned Mr. Anelich right at the time he was injured and went into the cabin of the vessel and laid down (R. 83). And Peter Mardesich, the master, went away to the bridge as he says, "to call help." And neither of them took the trouble to ascertain the extent of Mr. Anelich's injuries.

Antone Mardesich testified: (R. 83)

"Q. Why did you want to get him there quickly?

A. Because we know that he got some broken bones in there, and we couldn't fix it up for him, and we wanted to get him to the doctor right now; we aren't doctors; we are fishermen; we couldn't fix anything, you know. And if he is hurt, or anything like that, we can put some *iodine* on it, but when it is broken, or anything like that, we can't fix that up."

Q. Did you bandage it up?

A. No, we just put that rope on it so he wouldn't bleed, because *he was bleeding so*, and they seen more than I did because I was sick and excited, and I had to go to the pilot house and get me some digilatis for my heart and I laid there for a while until I got through with it."

Further bearing on the question of proper medical attention, and the casual connection between the original injury and the death the evidence showed: Dr. Teufel (R. 161-162)

"Q. And there is no first-aid treatment that would prevent that, (germs from entering), is there, Doctor, by a layman, that you know of?

A. Well, the use of ordinary preventive measures such as antiseptics and putting aspetic dressings on the would would minimize the possibility I would say.

Q. (Mr. Pierce): Well, assuming that the man's clothes and underwear had been ground into the flesh and that the flesh was bruised, it would be a dangerous situation for a layman to endeavor to clean up, would it not?

A. Well, I don't think that; a layman would probably be limited to swabbing the thing with an antispectic solution, applying a sterile dressing, and possibly placing him in the care of a hospital or physician so no further injury could occur to it.

Q. Blood poisoning and speticemia is not unusual, is it, even where hospitalization takes place shortly after the accident occurs?

A. You say usual?

Q. Well, is it not unusual?

A. Well, I would say that less cases develop. I would say the majority of cases do not develop the septicemia.

Q. The majority of cases?

A. Do not.

Q. And that, regardless of the time they are hospitalized?

A. Yes, I would think so. The mere fact that there are so many people living on the earth is proof of that.

Q. But it is impossible for you to tell from the observations that you made of this man, when this bacteria or poison was introduced or got into his system?

A. I am not able to say positively, but I've got an opinion.

Q. And it may have gotten in at the very instant or within a comparatively short time after the accident occurred?

A. Yes. * * *

A. Am I supposed to give an opinion?

Q. Yes.

A. Well, I would say that a man who had medical treatment naturally would run less chance of having infection than if there were delay in his treatment.

In the case at bar, there was sufficient evidence to warrant the jury in finding that the neglect to give him care and treatment contributed to his injury, pain, suffering and death.

See also similar testimony of Dr. Laige (R. 165) and of Dr. Sturdevant. (R. 266)

From the testimony it is obvious that petitioners are not stating the facts when they state, on page 71 of

their brief, that all four doctors testified that the germs causing death entered the wound at the time of the original injury.

Numerous complaints are made of the Court's ruling in admitting testimony as to pain and suffering; negligence in the delay in getting him to the doctor; and the evidence pertaining to the petitioner's alleged negligence in not calling an airplane, which would have taken only two hours; all of which, we believe, were questions of fact for the jury to determine. The evidence offered and received was not objectionable, in that it was proper to show the facts so that the jury might weigh and consider such evidence, and that all objections made thereto were in the nature of challenges to the weight of the testimony rather than to its admissibility. Such testimony was proper for the jury to consider in determining whether or not it contributed to the deceased's *pain and suffering* which was an independent item of damage properly recoverable in this action.

Petitioners further contend and strongly urge that all of this testimony pertaining to the alleged negligence in caring for the deceased and his injuries, was improper and should have been excluded on the theory that the evidence did not establish any causal connection between the failure to give the deceased proper

medical attention and his death. They cite the case of *Cortes vs. Baltimore Insular Line*, 66 Fed. (2d) 526, and at page 73 of petitioner's brief they say:

> "The Circuit Court of Appeals of the 2nd Circuit 66 Fed. (2d) 526, (1933) denied recovery, as follows:"

and then they quote at length various excerpts from the decision of the Circuit Court of Appeals in the *Cortes* case as supporting their contention that the Court denied recovery, while as a matter of fact the Court did not deny recovery.

The history of the *Cortes* case, in the various courts, is extremely interesting on the subject here under discussion. A recovery was allowed in the trial Court from which an appeal was taken to the Circuit Court of Appeals.

The Circuit Court of Appeals 52 F. (2) 22, held that failure to give medical attention to a seaman is *not* personal injury under the Jones Act. This Court, 287 U. S. 367, speaking through Mr. Justice Cordoza, held that failure to give medical attention was a personal injury within the meaning of the Jones Act, and remanded the case to the C.C.A. for the reason that the Court had assumed, without deciding, that the care of the seaman had been negligent and that there was a causal connection between the negligence and the

death; correctness of that assumption had been challenged by the ship owner; these issues of fact being still open and undecided the cause was reversed and remanded so that the C.C.A. could dispose of these issues.

In the second opinion in the C.C.A., 66 Fed. (2d) 526 at 528, the Court held that under the record as it then existed, it could not be determined what kind of pneumonia the deceased died from, and therefore it could not be determined whether or not there was a causal connection between the failure to give the seaman medical attention and that of his death. The cause was remanded for a new trial and taking of further testimony.

In the second trial of this case, 6 Fed. Supp. 604, the sufficiency of the evidence was again challenged on the ground of the lack of causal connection between the lack of care and death, the court reserved decision and submitted the case to the jury, and there was a verdict for the plaintiff. The court then passed upon the sufficiency of the testimony and in doing so reviewed the decision of the C.C.A. reported in 66 Fed. (2) 526, and said:

"Had the medical testimony presented at the second trial been identical with that at the first, I should feel compelled to accept the foregoing as an expression on the part of the C.C.A. that causal connection between the negligence of the defendant and the seaman's death had not been sufficiently established to support the jury finding of causal connection. The testimony did in my opinion, sufficiently vary on the occasion of the second trial to to justify its reconsideration *denovo*."

"True, there was no positive testimony and obviously from the circumstances of the case none could be presented establishing, with certainty, the type of pneumonia from which the seaman died. There was, however, some testimony, apart from the matter of percentages of occurrance of the several types, which would justify the jury in concluding with reasonable probability that it was not the most dangerous Friedlander type. I am mindful that even if we accept the premise that the jury was justified from the evidence in that finding, still it is clear that no doctor could testify and no jury could find, with certainty, that had the most skillful treatment been available the seaman would have lived. It can only be said that had the ship's officers given to Santiago considerate and reasonable care within their limited knowledge and power to act, or had themselves, or with the assistance of the Coast Guard, put the patient ashore for hospitalization at a point en route instead of keeping him on board until their return to N. Y., his chance of recovery, would have been substantially greater. It is obvious that in a trial of most issues between litigants more conclusive and satisfactory proof of causal connection than this would be required. The law must, however, to do justice between parties, recognize different degrees and standards of proof varied somewhat

by the character, possibilities, and circumstances of the cause involved. Where one is fatally injured, no one with certainty can know what the individual's life's span would have been, but the law recognized that the larger measure of justice is accomplished by assuming that the deceased had the average expectancy as established by the mortality tables. So we here do not know that the seaman would have lived had the defendant's negligence not intervened. We know only that from usual experience the wrongful act of the defendant substantially lessened his chance. Inconclusive and unsatisfactory as this kind of proof may be, there intrudes upon our consideration the query in a case of this character: Is not greater justice done by resting the burden of that uncertainty upon the wrongdoer, rather than the one wronged? My own mind is drawn to that view."

"In this case when before the Supreme Court on the question of the right to sue under the Jones Act, that court * * * said: '* * * This court has held that the act is to be liberally construed in aid of its beneficient purpose to give protection to the seaman and to those dependent on his earnings. * * * Congress did not mean that the standards of legal duty must be *the same by land and sea.* Congress meant no more than this, that the duty must be legal, i.e., imposed by law; that it shall have been imposed for the benefit of the seaman and for the promotion of his health or safety * * *."

"If in this case we accept as established the fact of negligent conduct of the defendant and deny recovery on the ground of insufficient proof of causal connection with death, there will be left open a class of cases under a statute intended for the protection of the health and safety of seamen where neglect of duty can be admitted with impunity. The spirit of our jurisprudence, while

> fostering conclusiveness and certainty, does not look with favor upon nurturing wrong doing and denying a remedy. The nearest approximation to reasonable justice in this case necessitates the denial of the motion to dismiss."

In discussing this very question Justice Cardozo said:

> "Let us suppose the case of a seaman slightly wounded through his own fault, but suffering grievous hurt thereafter as a consequence of Septic poisoning brought about by lack of treatment. The common speech of man would give a like description to the wrong that he has suffered. The failure to provide maintenance or cure may be a personal injury, or something else according to the consequences. * * * If the default of the vessel and its officers has impaired his bodily or mental health the damage to mind or body is none the less a personal injury, because he may be free at his election to plead it in a different count." Cases cited. "Nor is liability escaped by appeal to the distinction between acts of ommission on the one hand and those of commission on the other."

This Court can well appreciate the vast distinction between the *Cortes* case (a seaman suffering from pneumonia) and the case at bar, where the original injuries were caused by the petitioner's negligence and the physical injuries were so apparent and so serious that the defendants were unable to witness his suffering, became ill, and left him to be transferred in the skiff of the Congress to that vessel and thereupon abandoned him.

In *Zinnell vs. U. S. Shipping Board*, 10 F. (2) 47 (C.C.A. 2) (1925), the appellant argued that no one could tell whether the deceased was drowned or killed as a result of the negligence in not having the guard rope in place. On this question the court said:

> "Nobody could, in the nature of things, be sure that the intestate would have seized the rope, or, if he had not, that it would have stopped his body. But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it."

So in the case at bar we cannot secure evidence which will demonstrate that the failure to give this or that treatment at this or that particular time was beyond a reasonable doubt, the thing that caused the death.

In *Langness v. Green*, 282 U. S. 532, 32 F. (2d) 284 this court held that the question of what caused the injury was for the jury.

At page 70 of petitioner's brief in discussing the question of proximate cause of the death, they said:

> "This phase of the case is entirely removed from the first two specifications of error, and the question of liability for the original injury is not involved."

The duty to provide care is admitted and we do not think that petitioners can divorce their negligence in failing to give him proper care from the resultant death on the theory that their duty was the same re-

gardless of how his original injuries occurred.

In substance as we understand it, petitioner's contention is that their neglect to give him medical care is immaterial and should not be considered because the evidence shows that in all probability the septecemia germs got into the wound at the time of the original injury and it has not been shown that any medical attention would have prevented his death.

In other words, even though they admit their negligence in causing the original injury, they are not liable unless the respondent proves that he could not have died from any cause other than their failure to provide proper medical attention.

It is respondent's contention that unless petitioners can exculpate themselves from blame for the original injury they cannot be heard to say, that their neglect to furnish medical care did not contribute to the pain, suffering and death of the deceased.

Having set in motion through their neglect an egency of harm they are liable for all damages proximately resulting therefrom, and it is immaterial whether the act was one of commission or omission.

This court should not require the widow and children to produce evidence that demonstates *conclusively* a casual connection between the negligence disclosed by

the physical facts and circumstances and the death, when the only evidence which she can produce to explain these physical facts and their relation to the injury must come from the reluctant lips of the defendants and their employees. The rule contended for by appellant would amount to a denial of justice, and the Supreme Court of Washington so held in *Frescoln v. Puget Sound T. Co.* 188 P. 5; 90 Wash. 59 at 64, where is said, quoting from the Court's decision from *St. Germain vs. Potlatch Lumber Co.*, 76 Wash. 102:

> "The court held the circumstances tending to show a soft roadway, and loose mortise joints in the pilot of the engine, sufficient to carry the case to the jury. The court said: 'A plaintiff in this character of case is not obligated to establish the material facts essential to a recovery beyond a reasonable doubt. Such a rule would amount to a denial of justice. It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the accident causing the injury happened in such a way as to fix liability upon the person charged with such liability, than it is that it happened in a way for which the person so charged would not be liable. 'There are very few things in human affairs, and especially in litigation involving damages, that can be established to such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for the damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as

to justify a reasonable juror in concluding that the thing charged was the prime and moving cause.' In other words, the plaintiff is only required to satisfy the jury, by a fair preponderance of the evidence, that the accident causing the death occurred in the manner he contends it did. We think the evidence here justified such a finding, and that there is no cause for sustaining a challenge to the sufficiency of the evidence.' "

The Court then said:

"The cause of an accident, like any other fact may be proven by circumstantial evidence. * * * It is true, as we have often held, a verdict may not rest upon pure speculation, but the correlative is also true that a verdict resting upon competent evidence may not be set aside upon pure speculation."

In *Sandanger v. Carlisle Packing Co.*, 192 P. 1005, 112 Wash. 480, the Washington Supreme Court in laying down the rule said:

"Speculation and conjecture, when used in this connection, means the same thing. The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another. As soon as the balance of possibilities is broken, the jury is put to the burden of weighing the evidence."

The balance of possibilities was broken in this case when it was proven by a preponderance of the evidence that the clutch was so worn that it would not stay in mesh and that the stick or lock was prepared and used to lock the clutch in place, making it difficult to dis-

engage it in time to prevent the deceased's leg from being pulled into and wound around the winch. This was the cause of the original injury, and the proximate cause of his death, even, if we assume that the septecemia germs entered the wound at the very instant it was opened. Again the balance of possibilities was broken when the defendant deglected to use their first aid kit. Also when they neglected to examine the wound and ascertain what any ordinary layman could see, that his leg was practically torn off, and with such information easily ascertainable, they neglected to call Dr. Sturdevant, who could have been present within about thirty minutes, and could have and would have provided the necessary treatment to render innoxious the germs, if any, then in the wound, and to prevent additional germs from entering. Again the balance was broken when the owner of the boat, while standing near the handle negligently failed to shut off the winch. The evidence was sufficient on all these issues to put the jury to the burden of weighing it, and they did weigh it and found each and all of these facts against the appellants, and rested their verdict upon competent evidence "and it may not be set aside upon pure speculation."

The appellants, in effect, say we cannot be held for our ommission to give the deceased medical care and

attention, because it is impossible for respondent to prove, and she did not prove, that Mario Anelich would have lived if he had had prompt and proper medical attention, in other words, they say, yes, we neglected him; we didn't call the doctor as soon as we could have; we didn't use our first aid kit; we didn't look at his wounds, but shifted him onto another vessel and abandoned him, but all that is of no consequence; Mr. Anelich is dead and while he may have died from our neglect to give him care, you can't prove it and any finding of the jury on that fact would be mere speculation and conjecture. That as it is physically impossible to now say that had we used due care in the prompt use of our first aid kit and supplied for him immediately the most efficient medical care, skill, attention and hospitalization at the very earliest moment possible, he still may not have lived, at least it cannot be proven that he would have; by our neglect to give him care we have put the matter beyond the scope of proof and without proof of that fact, there is no casual connection, and we cannot be held to account for our neglect, and we now ask this Court to permit us to plead and take advantage of our own independent conduct as a defense to this lawful claim, because this issue has, by our negligence, been put beyond the possibility of proof.

Instruction No. 6 given by the Court, and to which there was no objection, thereby making it the law of the case read in part as follows:

> "To sustain this burden it is not necessary, however, that the plaintiff show that the injuries received resulted in death immediately, nor is it necessary to prove that the injuries received were the sole cause of death, but if the injuries sustained at the time of the accident set in motion other forces which contributed to produce death, then the wrongdoer is liable."

The negligent opening of this wound made it possible to allow germs to enter, either at that time or by the negligent delay and handling of the deceased thereafter; that the injury set in motion the germs which contributed to produce death. It is entirely probable that the moving of this man from the large boat to the skiff and from the skiff to another boat, without a SPLINT upon his leg further opened his wounds and allowed additional germs to enter. We submit that the jury were warranted in finding that the negligence of the petitioners was the proximate cause of the death.

CONCLUSION

In conclusion we respectfully submit:

(1) That prior to and since the decision in the Osceola case it has been the recognized law that a seaman does not assume the risk of an unseaworthy vessel

or defective appliances, even though he continued to work with knowledge of the defect; that by the passage of the Jones Act Congress intended to and did enlarge the rights of seamen; that this court should continue to construe the act commensurate with the beneficient purpose for which it was enacted; that since the passage of the Jones Act the weight of the better authority, and the decisions of this court, so far as applicable, have laid down the rule contended for by respondent; that by departing from this rule the court would do violence to the Jones Act and overrule the Osceola case and a long line of well considered opinions so construing and following that case, this, we do not believe the court should do.

(2) Even if the court does not hold strictly to this view, still under the facts in the case at bar there was a total failure of proof of either branch of the defense of assumption of risk, and there was no issue on this defense, under the proof and offered instructions to be submitted to the jury.

(3) That under the evidence the jury was warranted in finding that the injury proximately resulted from the personal negligence of the owner in failing to disengage the clutch, which negligence, under the Act, Anelich could not have assumed.

(4) That the other questions raised by appellants are questions of fact, all of which have been foreclosed by the verdict of the jury, and should not be disturbed by this court.

It is therefore respectfully submitted that the judgment of the lower court should be affirmed.

WILBUR ZUNDEL,
SAMUEL B. BASSETT,
Counsel for Respondent.

March 21, 1936

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OCTOBER TERM, 1935

NO. 667

THE "ARIZONA," ANTONE MARDESICH and wife, PETER MARDESICH and wife, and GENERAL CASUALTY COMPANY OF AMERICA,
Petitioners,

vs.

ANTONIA ANELICH, as Administratrix of the Estate of MARIO ANELICH, Deceased,
Respondent.

PETITION FOR REHEARING

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Supreme Court of the United States

OCTOBER TERM, 1935

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PETITION FOR REHEARING

Come now the above named petitioners, the "Arizona," Antone Mardesich and wife, Peter Mardesich and wife, and General Casualty Company of America, and present this, their petition for a rehearing of the above entitled cause, and in support thereof, respectfully show:

I.

That the decision of the Court in its present form leaves undecided one of the most important questions in regard to the defense of assumption of risk, and therefore fails in its purpose to settle the law.

II.

That the decision in stating that assumption of risk was not recognized as a defense prior to the Jones Act in any American case is in error and ignores several cases cited in petitioners' brief.

III.

That the decision apparently fails to grasp that the action herein is based upon negligence and is not one for unseaworthy conditions.

IV.

That the decision ignores cases granting the defense of assumption of risk subsequent to the Jones Act which, in the interests of accuracy, should at least be mentioned.

Since the Court has indicated its wish to discuss and decide only the question of assumption of risk, points raised in this petition are confined to that defense alone.

I.

There has in every case in every jurisdiction been no question upon one point: That is, that as to steve-

dores, longshoremen and harbor workers, the defense of assumption of risk is as available as it would be in an action by any shore employee. *O'Brien v. Luckenbach S. S. Co.*, 293 Fed. 170; *DeLuca v. Shepherd S. S. Co.*, 65 Fed. (2) 566; *Long v. Silverline*, 48 Fed. (2) 15; *The Richelieu*, 48 Fed. (2) 497; *Skolar v. Lehigh Valley R. R. Co.*, 60 Fed. (2) 893; *Scheffler v. Moran Towing & Transport Co.*, 68 Fed. (2) 11; *Holm v. Cities Service Transportation Co.*, 60 Fed. (2) 721; *Jeffries v. DeHart*, 102 Fed. 765; *Cunard S. S. Co. v. Smith*, 255 Fed. 846; *McGinn v. North Coast Stevedoring Co.*, 149 Wash. 1, 270 Pac. 113; *Yaconi v. Brady & Gioe, Inc.*, 246 N. Y. 300, 158 N. E. 876, opinion by Cardozo, C. J.

The plaintiff in each of these cases was a seaman, within the meaning of the Jones Act; in each case decided subsequent to the Jones Act, his action was brought under the Jones Act; is this body of authority, to which other cases could easily be added, representing the most recent decisions of the Circuit Court of Appeals for the Second Circuit, as well as those of other Circuits, to be considered as overruled by the present decision without even a reference being made to it?

The decision in its present form speaks broadly of "seamen." That term has been extended under the Jones Act to cover longshoremen, stevedores, tug boat-

men. *Warner v. Goltar*, 293 U. S. 155. Apparently the effect of the instant decision is to deny to the employer of such casual water workers the defense of assumption of risk. Anelich was such a worker.

It is submitted that no authority can be found to support such a holding; and it is further submitted that the unanimous holding of the courts has been that as to such workmen the reason for the freedom from a defense of assumption of risk does not exist.

This is a question that is left unanswered by the instant decision. Surely it was not the intention of this Honorable Court to overrule a principle having unanimous support in Federal and State courts alike, without reference thereto; yet on the other hand the language of the Court upon the facts of the instant case indicates that this was done.

II.

The decision, in speaking of cases decided before the Jones Act brought by seamen to recover for injuries attributable to defective equipment, contains the following statement:

> "But no American case appears to have recognized assumption of risk as a defense to such a suit."

Petitioners wish to point out the following cases which the Court apparently has overlooked, set forth

on Page 33 of petitioners' brief: *The Maharjah*, 40 Fed. 784; *The Serapis*, 51 Fed. 91; *The Luckenbach*, 53 Fed. 662; *The Saratoga*, 94 Fed. 221; *Jeffries v. DeHart*, 102 Fed. 765; *The Scandinavia*, 156 Fed. 403; *Globe S. S. Co. v. Moss*, 245 Fed. 54; *Cunard S. S. Co. v. Smith*, 255 Fed. 846. It is submitted that prior to the Jones Act, assumption of risk was recognized as a defense in all cases save where an order was given impelling the use of the defective equipment, and thus allowing no room for voluntary assumption of the risk of its use. In the present case there was no such impelling order, nor was there any duty of strict obedience upon Anelich, had such an order been given.

To state that because the defense of assumption of risk was not mentioned in the decision of *The Osceola*, 189 U. S. 158, such defense was not existent is, it is respectfully submitted, drawing an unwarranted inference; contributory negligence was not referred to in *The Osceola*. Many cases have established that both contributory negligence and assumption of risk were defenses prior to the passing of the Jones Act and this Court in answering the questions certified to in *The Osceola* made no reference to either defense.

III.

The decision throughout speaks of unseaworthiness as the basis for the cause of action and states that in

an action for such unseaworthy condition the defense of assumption of risk is not available. Petitioners respectfully assert that this is beside the issue in the present case. This action is not one which could have been maintained prior to the Jones Act. As this Court points out in the instant decision, the action is one necessarily based solely upon the Jones Act and conferred only by that enactment. The Jones Act itself is not a wrongful death statute; its vitality in that respect, and the details regarding how that energy can be exercised, comes only from the Federal Employer's Liability Act. The Federal Employer's Liability Act allows recovery only where the *negligence* on the part of the employer is the proximate cause of the accident to the employee.

The present action, and all actions under the Jones Act, are, therefore, based upon negligence and not upon unseaworthy conditions. This was expressly stated in *Engel v. Davenport*, 271 U. S. 33; and in *Pacific S. S. Co. v. Peterson*, 278 U. S. 130, 138.

New rules of liability, drawn from the common law —a common law right of action for negligence—have been drawn into the Maritime law. While it is true that the new rules take their strength in operation only from their inclusion in the Maritime law, yet the scope of those rules — the terms and conditions

upon which the right may be exercised—have already been established at common law. The Jones Act deals with and extends to the personal representative of deceased seaman a common law form of liability to be asserted against the employer of such seaman, and provides for its enforcement in common law courts. "Negligence" and "unseaworthiness" are not synonymous. When seamen are given a right of action for negligence on the part of their employer, is it not logical and sensible that said cause of action shall be modified by the defenses which have become a part of such a cause of action, insofar as they are compatible with the conditions under which the seaman does his work?

IV.

In the interests of accuracy, it should be pointed out that Footnote 3 of the instant decision, containing a list of cases which have denied the defense of assumption of risk since the Jones Act and those contra, is incomplete. To the two cases there cited as contra, in support of the petitioners' position, should be added the following: *Peterson v. Sanford Tug Co.*, 28 Fed. (2) 283; *M. J. McCahan Co. v. Stoffel*, 41 Fed. (2) 651; *The Calvert*, 51 Fed. (2) 494; *The Zealand*, 49 Fed. (2) 781; *Southern Railway Co. v. Hermans*, 44 Fed. (2) 366; *Johnson v. U. S.*, 74 Fed. (2) 703.

Perhaps these cases were overlooked by the Court in making its decision; no mention of them is found elsewhere in the opinion

* * * *

It is submitted that had the plaintiff's decedent in this case been a seaman in the generally accepted meaning of that term, subject to rigid marine discipline and to fine and punishment for disobedience, and that further, had he been ordered by his superior to use the winch, assuming it to be defective, upon the occasion in question, the result that this Honorable Court has reached would be correct.

Petitioners respectfully assert, however, that under the facts presented in the instant case—of a man in the category of a harbor worker, under no strict duty of obedience to orders and, indeed, a worker on shares, almost in the position of a proprietor, included within the munificent provisions of the Jones Act only because of the liberal construction placed upon it, working upon a piece of equipment used by him for many days without complaint or question and after innumerable opportunities to terminate his employment—the decision as handed down is opposed to the great weight of authority in the lower Federal Courts and, what is more important so far as this Court is concerned, opposed to the logic and justice of the rea-

soning of judges the country over. When a plaintiff is in no different position, under no different duty than is a shore worker, and when his cause of action is based upon identical legal duties as the shore worker's, it is respectfully submitted that the ancient and oft repeated principle affording special protection to seamen as the wards of admiralty is unnecessary, and serves only as a convenient device to reach a result which, under the facts here revealed, is unjust and which under present day conditions is no longer necessary.

It is an old adage of the law, even older perhaps than the one that seamen are peculiarly the wards of admiralty, and certainly more fundamental than that, that when the reason for the rule fails, the rule itself does not obtain. Without this fundamental concept in mind, there could be no advancement of the law to keep pace with changing social conditions.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Supreme Court of the State of Washington be, upon further consideration, reversed.

Respectfully submitted,

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Counsel for Petitioners.

RALPH S. PIERCE,

CERTIFICATE OF COUNSEL

I, P S. Pierce, counsel for the above named petiti rs, do hereby certify that the foregoing petition a rehearing on this cause is presented in good faith and not for delay.

.....

Counsel for Petitioners.

RALPH S. PIERCE,

pp. 1, 5, 6, 7

SUPREME COURT OF THE UNITED STATES.

No. 667.—October Term, 1935.

The "Arizona," Antone Mardesich and Wife, Peter Mardesich and Wife, and General Casualty Company of America, Petitioners, *vs.* Antonia Anelich, as Administratrix of the Estate of Mario Anelich, Deceased.	On Writ of Certiorari to the Supreme Court of the State of Washington.

[April 27, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, — U. S. —, because of the importance of the question, to review a determination of the Supreme Court of the State of Washington, 183 Wash. 467, that assumption of risk is not a defense to an action brought under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, to recover damages for the injury and death of a seaman caused by a defective appliance, a part of the equipment of a fishing vessel on which he was employed. 49 P. (2d) 3,

The injury occurred at sea, when respondent's intestate was engaged in hauling in, with a power winch, the purse line of a fishing net. During this operation the drums of the winch, as was customary, were kept in continuous revolution at a speed of about eighty revolutions per minute. The two ends of the purse line, whose function is to purse, or close, the net at the bottom, were reeved through blocks hanging from a davit at the side of the vessel, from which they ran respectively to the aft and forward drums of the winch. Decedent was stationed at the aft drum, where his duty, like that of the winchman at the forward drum, was to take several turns of his end of the purse line about the revolving drum and hold the line taut, so that the winch would haul it in, and to coil the line as it came off the drum. When the rings at the bottom of the net through which the purse line passes came to

the surface of the water, a bridle, or strap, was passed around the net and rings and attached to block and tackle suspended from a boom of the vessel. The purse line is then customarily thrown off the drums, and the net is raised higher by taking several turns about the forward drum with the line from the block and tackle, which then carries a load of about a ton and a half, and hauling on it. It was at this stage of the operation that decedent was injured. The purse line had been removed from the forward drum, and several turns of the line from the block and tackle, which was supporting the net, had been taken around this drum, when, in some way which does not clearly appear, the decedent's leg became entangled in the purse line, which was not clear of the aft drum. Before the winch could be stopped his leg was drawn onto the drum by the purse line, the bones were broken and the flesh lacerated. Septicemia ensued, from which he died.

Power was transmitted to the winch by a countershaft connected by a chain gear drive with the main, or propeller, shaft. There were two methods for starting and stopping the winch. One was by the operation of a lever located between decks, near the engine, which controlled the clutch on the main shaft. The other was by a lever located above deck, on the starboard side of the winch frame, between the drums, by which the jaws of the clutch connecting with the chain drive of the winch could be engaged with the corresponding jaws of the clutch keyed onto the main shaft. Attached to the winch frame by a string was a forked piece of wood designed for use as a brace to hold the winch lever in a position which would cause the clutch to engage, and prevent its slipping or disengaging while the winch was in motion. When placed in position this brace extended from a cleat on the frame of the winch to the winch lever.

It is respondent's contention that the clutch was so defective, through long wear, that it would not remain engaged without the use of the brace to hold it in position; that the presence of the brace in position at the moment of the accident so prevented or delayed use of the lever at the winch that it was necessary to use the lever below deck to disengage the clutch on the main shaft in order to stop the winch; and that the consequent delay, after the alarm was given, was the proximate cause of decedent's injury.

The trial court refused petitioners' request to charge that voluntary assumption by decedent of the risk of injury by the unsafe appliance was a defense to the action, and denied their motion for a non-suit and for a directed verdict. It left it to the jury to say whether petitioners had negligently failed to provide decedent with a safe appliance with which to work, and whether such failure was the proximate cause of the injury and death. The state Supreme Court sustained the judgment of the trial court upon a verdict for respondent, holding that, in the circumstances disclosed by the evidence, assumption of risk is not a defense in a suit under the Jones Act.

We granted certiorari to review the ruling upon the assumption of risk, and not for the purpose of reexamining the evidence of negligence and probable cause. With respect to the latter, it suffices to say that, although the testimony was conflicting, there was evidence from which the jury could have found that the clutch controlled by the lever at the winch was negligently allowed to remain in a defective condition; that because of the defect it would not remain engaged and the winch drums would not turn continuously unless the lever controlling the clutch was held in position by the brace; that the use of the brace to prevent the worn clutch from slipping or disengaging rendered the winch defective, and unsafe to those required to work in its vicinity, and that the use of the brace, and the consequent delay in stopping the winch from the engine room, when the alarm was given, was the proximate cause of the injury and death. We do not discuss other questions of lesser moment, including those growing out of the alleged negligent failure of petitioners to provide decedent with prompt and appropriate medical attention as a contributing cause of his death, but direct our attention to the question brought here for review, whether assumption of risk is a defense to suits under the Jones Act.

Since the maritime law allowed no recovery for the wrongful death of a seaman, see *Lindgren* v. *United States*, 281 U. S. 38, respondent's asserted right of action is conferred by § 33 of the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, which gives to a seaman injured in the course of his employment, at his election, a right of action for damages at law, with trial by jury, in which "all statutes of the United States modifying or extend-

ing the common law right or remedy in case of personal injury to railway employees shall apply." In case of the death of the seaman as a result of the injury, it similarly gives a right of action to his personal representatives in which "all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51, thus incorporated in the Jones Act by reference, gives a right of recovery for the injury or death of an employee of a common carrier by rail, in interstate or foreign commerce, "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . appliances, machinery . . . or other equipment." By § 3 of the Act, 45 U. S. C. § 53, contributory negligence does not bar recovery, but is ground for apportionment of the damages between employer and employee, and by §§ 3 and 4, 45 U. S. C. §§ 53, 54, it is provided that no employee shall be held to have been guilty of contributory negligence or "to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The Jones Act thus brings into the maritime law new rules of liability. The source from which these rules are drawn defines them but prescribes nothing as to their operation in the field to which they are transferred. "In that field their strength and operation come altogether from their inclusion in the maritime law" by virtue of the Jones Act. The election for which it provides "is between the alternatives accorded by the maritime law as modified and not between that law and some non-maritime system", *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 388, 389; and see *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 380, 381; *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130.

In applying the Federal Employers' Liability Act, in suits brought by railroad employees, it has been settled by numerous decisions of this court that assumption of risk is a defense in a suit brought to recover for injuries resulting from defective appliances, the use of which is not required by the Federal Safety Appliance Act, see *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492; *Jacobs*

v. *Southern R. Co.*, 241 U. S. 229; *Boldt* v. *Pennsylvania R. Co.*, 245 U. S. 441, 445. The fact that the statute deals with and extends a common law form of liability, provides for its enforcement in common law courts, and prescribes that certain common law defenses, including assumption of risk, shall not be available in specified cases, led to the conclusion that such defenses, when not excluded by the terms of the statute, are impliedly authorized.

But the Jones Act does not, by its own terms, or by those adopted by reference from the Employers' Liability Act, prescribe that assumption of risk shall be a defense to the liability imposed for injuries to seamen on navigable waters, or, apart from the specific references to the fellow servant and contributory negligence rules, purport to enlarge or modify the defenses available in maritime law to suits brought to recover for such injuries. In the absence of such a definite command the scope of the new rules of liability and the nature of the defenses to them must be ascertained by reference to their new setting in the admiralty system.

While the maritime law before the enactment of the Jones Act permitted no recovery for injuries resulting in the death of a seaman, or generally for injuries resulting from the negligence of a fellow servant or the master,[1] a seaman who fell sick or was injured in the course of his employment was entitled to "maintenance and cure", "at least as long as the voyage continued", see *Pacific Steamship Co.* v. *Peterson, supra*, and to recover from vessel or owner indemnity for injuries due to unseaworthiness of the vessel or "failure to supply and to keep in order the proper appliances appurtenant to the ship." These propositions were laid down in answering certified questions in *The Osceola*, 189 U. S. 158, 175, and they have often been cited with approval by this Court. See *Chelentis* v. *Luckenbach S. S. Co., supra*, 379, 380; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255; *Pacific Steamship Co.* v. *Peterson, supra*, 134; *Lindgren* v. *United States, supra*.

In declaring, in The Osceola, without qualification as to the assumption of risk, that the owner and vessel were liable to indemnify seamen for injuries caused by unseaworthiness of the

[1] In The Osceola, 189 U. S. 158, the Court did not answer the certified question, whether the master is a fellow servant, since it concluded that in any event the owners were not liable generally for injuries resulting from negligence unless they were occasioned by unseaworthiness or defect in appliances appurtenant to the ship.

vessel, and that unseaworthiness embraced defective appliances appurtenant to the ship, this Court adopted the pronouncements of many earlier cases in admiralty in which the rule was applied or recognized.[2] It was definitely applied by this Court in *Carlisle Packing Co.* v. *Sandanger, supra;* cf. *Plamals* v. *S. S. Pinar del Rio,* 277 U. S. 151, 155.

Before the Jones Act contributory negligence was ground for mitigation of damages in suits brought by seamen to recover for injuries attributable to defective equipment, see *The Wanderer,* 20 Fed. 140; *Olson* v. *Flafel,* 34 Fed. 477, overruling *Peterson* v. *The Chandos,* 4 Fed. 645; *The Frank and Willie,* 45 Fed. 494; *The Julia Fowler,* 49 Fed. 277; *John A. Roebling's Sons Co.* v. *Ericson,* 261 Fed. 986, 987; *Cricket S. S. Co.* v. *Parry,* 263 Fed. 523; *Storgard* v. *France & Canada S. S. Corp.,* 263 Fed. 545; *Panama R. Co.* v. *Johnson,* 289 Fed. 964, aff'd 264 U. S. 375. But no American case appears to have recognized assumption of risk as a defense to such a suit. In numerous cases this defense was either denied or ignored in circumstances plainly calling for its applica-

[2] The seaman's right of indemnity for injuries caused by defective appliances or unseaworthiness seems to have been a development from his privilege to abandon a vessel improperly fitted out. The privilege was recognized in Dixon v. The Cyrus, 2 Pet. Adm. 407 (D. C. Pa. 1789), where it was held that the law will imply an engagement to the mariners that "the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy." This case was relied on in several early cases recognizing the seaman's right to consequential damages for injuries resulting from faulty equipment. Halverson v. Nisen, 3 Saw. 562; The Noddleburn, 23 Fed. 854; The Lizzie Frank, 31 Fed. 477; and see The Winona, 1 Hask. 606. The rule that unseaworthiness releases the seaman from his contract is of uncertain origin, but it is closely related to the master's obligation to owner and shipper that the vessel be well equipped and ballasted. See Marine Ordinances of Louis XIV, Book II, Art. VIII, Moloy, De Jure Maritimo et Navali, (7th ed. 1722) p. 223. The seaman's right of indemnity was sustained in The City of Alexandria, 17 Fed. 390; The Edith Godden, 23 Fed. 43; Olsen v. Flafel, 34 Fed. 477; The A. Heaton, 43 Fed. 592; The Frank and Willie, 45 Fed. 494; The Julia Fowler, 49 Fed. 277. A seaman was denied recovery for injuries in Couch v. Steele, 3 El. & Bl. 402 (1853), on the ground that the owner owed to seamen no duty to make the vessel seaworthy. This case was disapproved in The Noddleburn, *supra,* 857, which allowed recovery for an injury due to defective rigging. The Merchant Shipping Act of 1876, 39-40 Vict. Ch. 80, § 5, provided that there should be imported into every contract of service between the owner of the vessel and the seamen on board an implied obligation "that the owner of the ship and the master, and every agent charged with the loading of the ship or the preparing thereof for sea or the sending thereof to sea shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage during the same." See Hedley v. Pinkney & Sons S. S. Co., [1894] A. C. 222, strictly construing this statute.

tion had it been available. *Halverson* v. *Nisen*, 3 Saw. 562; *The Edith Godden*, 23 Fed. 43; *The Julia Fowler, supra; The Noddleburn*, 28 Fed. 855; *Olson* v. *Flavel, supra; The A. Heaton*, 43 Fed. 592; *La Fourche Packet Co.* v. *Henderson*, 94 Fed. 871; *Globe S. S. Co.* v. *Moss*, 245 Fed. 54; *The Colusa*, 248 Fed. 21; *Cricket S. S. Co.* v. *Parry, supra.*

The seaman assumes the risk normally incident to his perilous calling, see *The Iroquois*, 194 U. S. 240, 243; *Cricket S. S. Co.* v. *Parry, supra*, but it has often been pointed out that the nature of his calling, the rigid discipline to which he is subject, and the practical difficulties of his avoiding exposure to risks of unseaworthiness and defective appliances, make such a defense, as distinguished from contributory negligence, see *Seaboard Air Line Co.* v. *Horton, supra*, 503, peculiarly inapplicable to suits by seamen to recover for the negligent failure to provide a seaworthy ship and safe appliances. See *The Colusa, supra*, 24, 25; *Cricket S. S. Co.* v. *Parry, supra*, 526; *Grimberg* v. *Admiral Oriental S. S. Line*, 300 Fed. 619, 621; *U. S. S. B. E. F. Corp.* v. *O'Shea*, 5 F. (2d) 123, 125; *States S. S. Co.* v. *Berglann*, 41 F. (2d) 456, 457.

Like considerations, and others to be mentioned, require a like conclusion with respect to the modified and in some respects enlarged liability imported into the maritime law by the Jones Act. The legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Cf. *Chelentis* v. *Luckenbach S. S. Co., supra.* Its provisions, like others of the Merchant Marine Act, of which it is a part, are to be liberally construed to attain that end, see *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375; *Jamison* v. *Encarnacion*, 281 U. S. 635, 639; *Alpha S. S. Corp.* v. *Cain*, 281 U. S. 642; *Warner* v. *Goltra*, 293 U. S. 155, 157, 160, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part. The denial in the Federal Employers' Liability Act of the defense of assumption of risk refers only to suits founded on the Federal Safety Appliance Act, applicable alone to railroads. It can raise no inference as to the availability of the defense in suits brought to recover for injuries to seamen. No provision of the Jones Act is inconsistent with the admiralty rule as to assumption of risk. The purpose and terms of the Act and the nature of the juristic field

in which it is to be applied, preclude the assumption that Congress intended, by its adoption, to modify that rule by implication. Such has been the conclusion reached generally by the lower federal courts, although not with entire unanimity.[3]

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[3] Denying the defense: Grimberg *v.* Admiral Oriental S. S. Line, 300 Fed. 619; U. S. S. B. E. F. Corp. *v.* O'Shea, 5 F. (2d) 123; Coast S. S. Co. *v.* Brady, 8 F. (2d) 16; Zinnel *v.* U. S. S. B. E. F. Corp., 10 F. (2d) 47; Howarth *v.* U. S. S. B. E. F. Corp., 24 F. (2d) 374; Masjulis *v.* U. S. S. B. E. F. Corp., 31 F. (2d) 284; States S. S. Co. *v.* Berglann, 41 F. (2d) 456; United States *v.* Boykin, 49 F. (2d) 762; Ives *v.* United States, 58 F. (2d) 201; Pittsburgh S. S. Co. *v.* Palo, 64 F. (2d) 198; Hanson *v.* Luckenbach S. S. Co., 65 F. (2d) 457; The New Berne, 80 F. (2d) 244. Contra: The Ipswich, 46 F. (2d) 136; Stevens *v.* R. O'Brien & Co., 62 F. (2d) 632.